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No. 2878

United States

Circuit Court of Appeals

For the Ninth Circuit.

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Names and Addresses of the Solicitors of Record.

R. F. GAINES, Esq., of Butte, Montana,

D. L. Wegg, Esq., of Stevensville, Montana,

GEO. T. BABGS, Esq., of Stevensville, Montana,

Solicitors for Defendants and Appellants.

GARRARD B. WINSTON, Esq., of Chicago, Ill.,

Messrs. WINSTON, PAYNE, STRAWN & SHAW, of Chicago, Ill.,

HENRY C. STIFF, Esq., of Missoula, Montana,

Solicitors for Plaintiffs and Appellees.

[1*]

In the District Court of the United States in and for the District of Montana.

No. 71.—IN EQUITY.

FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,

Complainants,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of the BITTER ROOT VALLEY IRRIGATION COMPANY, HANS B. KNUDSEN and CAROLINE KNUDSEN, HELEN E. CARTER, MAX BENNETT, HENRY BENNETT, JOSEPH ZITKA and W. G. PARKS,

Defendants.

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*Page-number appearing at foot of page of original certified Transcript of Record.

BE IT REMEMBERED, that on April 8, 1916, complainants filed their bill of complaint herein, which bill of complaint, except those portions thereof omitted by stipulation and mentioned in the praecipe for transcript herein, is in the words and figures following, to wit: [2]

In the District Court of the United States, for the District of Montana.

IN EQUITY.

FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of the BITTER ROOT VALLEY IRRIGATION COMPANY, HANS B. KNUDSEN and CAROLINE KNUDSEN, HELEN E. CARTER, MAX BENNETT, HENRY BENNETT, JOSEPH ZITKA and W. G. PARKS,

Bill of Foreclosure.

To the Judge of the District Court of the United States for the District of Montana:

First Trust and Savings Bank, a corporation organized and existing under the laws of the State of Illinois, and a citizen of said state, and Emile K. Boisot, of Chicago, Illinois, and a citizen of said state, by leave of this court first had and obtained, bring this, their bill, against Bitter Root Valley Irrigation Company, a corporation organized and exist-

ing under and by virtue of the laws of the State of Montana, and a citizen of said state, F. C. Webster, of Missoula, in the County of Missoula, and State of Montana, and a citizen of said State of Montana, as Trustee in Bankruptcy of said Bitter Root Valley [3] Irrigation Company; Hans B. Knudsen and Caroline Knudsen, who are citizens of the State of Minnesota, and Helen E. Carter, Max Bennett, Henry Bennett, and Joseph Zitka, who are citizens of the State of Iowa, and W. G. Parks, who is a citizen of the State of Montana; and thereupon your orators complain and say as follows:

I.

Your orator, First Trust and Savings Bank, is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and is a citizen of said state; and your orator, Emile K. Boisot, is a citizen and resident of the State of Illinois.

II.

Bitter Root Valley Irrigation Company is a corporation organized and existing under and by virtue of the laws of the State of Montana, and is a citizen of said State of Montana. F. C. Webster is a citizen and resident of the State of Montana, and is now in possession of the entire properties of the Bitter Root Valley Irrigation Company, as trustee in bankruptcy, appointed by this Honorable Court by its order entered on the 23rd day of February, 1916, in the matter of the Petition of Bitter Root Valley Irrigation Company to be adjudged bankrupt.

III.

On or about the 1st day of June, 1909, and on various days and dates thereafter as hereinafter set forth, the Bitter Root Valley Irrigation Company, by authority of its Board of Directors [4] and with the concurrence and consent of the owners and holders of seventeen thousand two hundred (17,200) shares, out of the total of twenty thousand shares constituting the entire capital stock of said company, issued its negotiable bonds to the aggregate amount of one million three hundred and seventy-six thousand dollars ($1,376,000.00) par value, consisting of eleven hundred and seventy-six (1,176) bonds for the principal sum of one thousand dollars ($1,000.00) each, and numbered consecutively from 1 to 479 inclusive, 501 to 647 inclusive, and 751 to 1,300 inclusive, and four hundred (400) bonds for the principal sum of five hundred dollars ($500.00) each, and numbered consecutively from 1301 to 1700 inclusive, said bonds dated as of July 1, 1909, and becoming due and payable as follows:

Bonds Nos. 1 to 100, due January 1, 1914.
Bonds Nos. 101 to 200, due January 1, 1915.
Bonds Nos. 201 to 314, due January 1, 1916.
Bonds Nos. 315 to 350, due January 1, 1916.
Bonds Nos. 351 to 374, due January 1, 1917.
Bonds Nos. 375 to 427, due January 1, 1917.
Bonds Nos. 428 to 437, due January 1, 1917.
Bonds Nos. 438 to 453, due January 1, 1917.
Bonds Nos. 454 to 479, due January 1, 1917.
Bonds Nos. 501 to 540, due January 1, 1918.
Bonds Nos. 541 to 586, due January 1, 1918.

Bonds Nos. 587 to 596, due January 1, 1918.
Bonds Nos. 597 to 647, due January 1, 1918.
Bonds Nos. 751 to 1180, due January 1, 1919.
Bonds Nos. 1181 to 1250, due January 1, 1919.
Bonds Nos. 1251 to 1296, due January 1, 1919.
Bonds Nos. 1297 to 1300, due January 1, 1919.
Bonds Nos. 1301 to 1400, due January 1, 1919.
Bonds Nos. 1401 to 1501, due January 1, 1919.
Bonds Nos. 1502 to 1521, due January 1, 1919.
Bond No. 1522, due January 1, 1919.
Bonds Nos. 1523 to 1700, due January 1, 1919.

by the terms of which bonds the Bitter Root Valley Irrigation Company acknowledged itself to owe and for value received [5] promised to pay to the bearer thereof the sum of one thousand dollars ($1,000.00) by each of said bonds, numbered from 1 to 479 inclusive, 501 to 647 inclusive, and 751 to 1300 inclusive, and the sum of five hundred dollars ($500.00) by each of said bonds numbered from 1301 to 1700 inclusive, in gold coin of the United States of America, of the then standard of weight and fineness, at the office of the First Trust and Savings Bank, in the City of Chicago, in the State of Illinois, or at the office of the First National Bank, in the City of New York, in the State of New York, without deduction for any tax or taxes, which the said company, or the trustees under the mortgage or deed of trust given to secure the same, as hereinafter set forth, might be required to pay or retain therefrom under any present or future law of the United States, or of any state, county, or municipality therein, and the said company therein and thereby agreed to pay

such tax or taxes, and to pay interest upon all of said bonds from their respective dates until paid, at the rate of six (6) per centum per annum, payable semi-annually on the first days of January and July in each year, upon presentation and surrender of the interest coupons thereto annexed. The form and tenor of said bonds are set forth at large in the mortgage or deed of trust hereinafter set forth and referred to.

IV.

On or about the first day of June, 1909, said Bitter Root Valley Irrigation Company, being thereunto duly authorized by the action of its Board of Directors, and with the concurrence and consent of the owners and holders of seventeen thousand two hundred (17,200) shares, out of the twenty thousand (20,000) shares which constitute the entire capital stock of said company, duly made, executed, acknowledged and delivered [6] to your orators, as trustees, its certain mortgage or deed of trust, dated the first day of June, 1909, wherein and whereby, in order to secure the due and punctual pro rata payment of said several bonds for the aggregate principal sum of one million three hundred seventy-six thousand dollars ($1,376,000.00) and the interest thereon, at any time issued and outstanding, and to secure the performance and observance of all of the covenants and conditions in said mortgage or deed of trust contained, said Bitter Root Valley Irrigation Company granted, bargained, sold, aliened, remised, released, assigned, pledged, mortgaged, transferred, conveyed, confirmed and set over unto your

orators in trust, as therein provided, and their successors in trust, and assigns, with full power of succession to and enjoyment of the rights and privileges, including the right of possession, of said Bitter Root Valley Irrigation Company, all that certain real estate and property situated in the county of Ravalli, in the State of Montana, which is set forth and described in said mortgage or deed of trust, as being granted, bargained, sold, aliened, remised, released, assigned, pledged, mortgaged, transferred, conveyed, confirmed and set over, and subject to all the terms and conditions of said mortgage or deed of trust, which is hereinafter set forth at large, and your orators hereby ask leave to refer to the description of the real estate and property therein contained with the same force and effect as if said description were here inserted and specifically set forth, and also certain land contracts and agreements concerning the purchase of state lands, as set forth and described in said mortgage or deed of trust, which is hereinafter set forth at large, and to which for a full description of said land contracts and agreements, and the lands covered thereby, your orators ask leave to refer as aforesaid, and also all the right, title and interest of the said Bitter Root Valley Irrigation Company in and to all contracts, agreements [7] and options for the purchase or sale of lands, made, entered into or acquired by the said company, or which said company may or might make, enter into or acquire, including contracts for the purchase of certain lands and real estate situated in Ravalli County, Montana, which is also set forth and de-

scribed in said mortgage or deed of trust hereinafter set forth at large, and to which for a full description thereof your orators beg leave to refer as aforesaid, and also the entire system of irrigation works owned by the said Bitter Root Valley Irrigation Company, as set forth and described in said mortgage or deed of trust, hereinafter set forth at large as aforesaid, and to which for a full description thereof your orators ask leave to refer to as aforesaid; and also all those certain water rights, situated in Ravalli County, Montana, as set forth and described in said mortgage or deed of trust, and to which as the same is hereinafter set forth at large your orators ask leave to refer as aforesaid for a full description thereof, together with all canals, ditches, laterals, weirs, headgates, pipe-lines, syphons, bridges, trestles, dams and flumes owned or thereafter acquired or constructed by the Bitter Root Valley Irrigation Company and the said company's entire irrigation system together with all power, privileges, easements and appurtenances then or thereafter used in connection therewith or thereto belonging, including all purchase money mortgages and the notes thereby secured, now or thereafter acquired by the said company, taken in part payment for lands theretofore or thereafter sold by the said company, to the extent and amount that said mortgages and the notes thereby secured are required to be deposited with the Trustees as provided in Section 9 of Article Three and in Section 3 of Article Seven of said mortgage or deed of trust, respectively, and also any and all other property of every name and nature (not-

withstanding the same was not particularly described [8] in said indenture) at the date of said mortgage owned or thereafter acquired by the company, except as therein excepted, including all lands and rights, estates or interests therein then owned or thereafter purchased or acquired by the company, together with all appropriations of water or water rights then owned or that thereafter might be acquired by the company.

And it was the true intent of the parties to said mortgage or deed of trust that it should convey all of the property therein described, together with all buildings, structures and improvements of every kind and character, which were at the date thereof upon, or might thereafter be placed upon said mortgaged property, and the income, rents, issues and profits therefrom, and any and all other property of every name and nature owned or thereafter acquired by the said Bitter Root Valley Irrigation Company, whether in said mortgage or deed of trust particularly described or not, including all lands and rights, estates or interests therein then owned or thereafter purchased or acquired by the said Bitter Root Valley Irrigation Company, and the income, rents, issues and profits therefrom, together with all appropriations of water or water rights then owned or thereafter acquired by the said company.

To have and to hold the said described property, real and personal, rights, interests, privileges, easements, franchises, choses in action, water appropriations, dams, reservoirs, canals, ditches, laterals, and system of irrigation works then owned or thereafter

acquired by said company, with all the easements, privileges and appurtenances thereunto belonging, unto your orators, its, his and their successors in trust, and assigns, but in trust, nevertheless, for the equal and proportionate benefit and security, severally and respectively, of all and every of the holders at any time of the bonds above mentioned [9] and the interest coupons appertaining thereto without preference or priority or distinction as to lien or otherwise of any one bond over any other bond, by reason of priority in the execution, delivery or negotiation thereof, or by reason of the purpose of the issuance thereof, so that each and every of said bonds should have under and by said mortgage or deed of trust the same right, lien and privilege as every other bond issued, and so that every such bond with the interest coupons thereto belonging should, subject to the terms of the said mortgage or deed of trust, be secured thereby equally and proportionately with every other bond, as if all of said bonds had been executed, certified, delivered and negotiated simultaneously with the execution and delivery of said mortgage or deed of trust, it being intended and provided thereby that the lien of said mortgage or deed of trust should take effect from the date thereof, without regard to the date of the actual issue, sale or disposition of said bonds, as if upon such date, all of said bonds had been actually issued, sold and delivered, and were in the hands of innocent holders for value for the uses and purposes and upon the terms and conditions in said mortgage or deed of trust more fully set forth.

Said mortgage or deed of trust, date June 1, 1909, as executed by the parties thereto, together with the names of the subscribing witnesses and the several certificates of acknowledgment thereof, thereunto appended, was and is in the words and figures following, to wit: [10]

THIS INDENTURE, made and entered into as of the First day of June, in the year of our Lord, one thousand nine hundred and nine, by and between the Bitter Root Valley Irrigation Company, hereinafter called the "Company," party of the first part, and the First Trust and Savings Bank (sometimes hereinafter for brevity called the "Bank") and Emile K. Boisot, of Cook County, Illinois, hereinafter called the "Trustees," party of the second part, Witnesseth:

Parties.

THAT WHEREAS, the said Trustee, the First Trust and Savings Bank, is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its office in the City of Chicago, County of Cook and State of Illinois; and

WHEREAS, the Trustees have full power and authority to take and held the property and to accept and undertake the trusts hereinafter particularly described and recited; and

Power of Trustees to undertake the trusts.

WHEREAS, the Company is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, having its principal

and registered office in the Town of Hamilton, Ravalli County, Montana, and also having an office in said City of Chicago, and has full power and authority, under said laws and its articles of incorporation, to borrow money and issue, pledge, and dispose of its negotiable coupon bonds therefor to the amount and for the purposes hereinafter stated, and in order to secure the payment of said bonds, with the interest thereon, to pledge and convey by way of mortgage or deed of trust its property, rights, privileges, and franchises; and

Power of Company to issue bonds and execute mortgage.

WHEREAS, the Company has acquired and now owns the real estate, land contracts and agreements, water-rights, canals, flumes, dams, irrigation works, mortgages, contracts, rights, franchises, privileges and other property hereinafter mentioned and described; and [11]

Property rights and contracts of Company.

WHEREAS the Company in purchasing and acquiring said property and in constructing, extending and equipping said canals, flumes, dams and irrigation works, has incurred a large amount of indebtedness which is now outstanding and unpaid, and has also incurred additional obligations for the completion of said canals, flumes, dams and irrigation works; and

WHEREAS, it is necessary for the Company to create and incur a bonded indebtedness in the amounts hereinafter stated, for the purpose of providing funds with which to pay the present outstanding indebtedness of the Com-

Necessity and purpose of bond issue.

pany, to complete and extend the Company's system of irrigation works, to develop the Company's property, including its lands, and to acquire additional property, including lands and to pay for lands heretofore contracted for by the Company or its assignors, capable of being irrigated by or from the Company's irrigation works and to acquire any other property or to construct any other works within the Company's corporate objects and powers; and

WHEREAS, the Board of Directors of the Company (with the concurrence and consent and by the direction of the owners and holders of 17,200 shares out of the 20,000 shares, which constitute the total capital stock of the Company, authorized and outstanding, expressed by their votes at a stockholders' meeting, duly called and held for the purpose) by resolutions duly adopted, have authorized and directed, subject to the provisions and conditions hereinafter set forth, the creating and incurring of a bonded indebtedness by the Company for the purposes aforesaid, to the amount or amounts and in the manner hereinafter provided; and by said resolutions have directed and provided that said bonds shall be negotiable coupon bonds, numbered consecutively from 1 upwards and of the following denominations, respectively: bonds numbered from 1 to 1300, both inclusive, one thousand (1000) dollars each; bonds numbered from 1301 to 1700, both [12] inclusive, five hundred (500) dollars each; and bonds numbered from 1700 upwards of such denomination or denominations as the Board of Directors of the Com-

Authorization of the stockholders and directors of the Company to issue bonds.

pany shall hereafter determine; that said bonds shall be executed in the name and on behalf of the Company by its president or vice-president under its corporate seal, and attested by its secretary, and each of the interest coupons attached to said bonds shall be executed by the engraved facsimile signature of the treasurer of the Company; that said bonds, numbered from 1 to 1700, both inclusive, shall bear date of July 1st, A. D. 1909, and shall be due and payable as follows, to wit:

Bond maturities.

Bonds numbered 1 to 100, both inclusive, on January 1, 1914.

Bonds numbered 101 to 200, both inclusive, on January 1, 1915.

Bonds numbered 201 to 350, both inclusive, on January 1, 1916.

Bonds numbered 351 to 500, both inclusive, on January 1, 1917.

Bonds numbered 501 to 750, both inclusive, on January 1, 1918.

Bonds numbered 751 to 1700, both inclusive, on January 1, 1919.

Bonds numbered from 1701 upwards shall bear such date or dates and shall be due and payable on such date or dates as the Board of Directors of the Company shall hereafter determine.

That said bonds shall bear interest from their date until paid at the rate of six per cent per annum, payable semi-annually on the first days of January and July in each year, which installments of interest, to date of maturity of principal, shall be evidenced by proper coupons attached to each bond; that both the

principal of and interest on said bonds shall be payable in gold coin of the United States of America, of the present standard of weight and fineness at the [13] office of the First Trust and Savings Bank, in the City of Chicago, in the State of Illinois; or, at the option of the holder, at the office of the First National Bank, in the City of New York, in the State of New York; that each of said bonds, and the Trustee's certificate to be endorsed thereon, and each of the said interest coupons shall be in substantially the following forms, respectively, to-wit:

Bond details.

Form of bonds.

(Form of Bond.)

No. —— $——

UNITED STATES OF AMERICA.

State of Montana.

Bitter Root Valley Irrigation Company.

First Mortgage Six Per Cent. Gold Bond.

Know All Men by These Presents: That the Bitter Root Valley Irrigation Company, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, hereinafter called the "Company," acknowledges itself to owe, and for value received hereby promises to pay to bearer the sum of ——— Dollars on the First day of January, A. D. 19—, with interest thereon from the date hereof until paid at the rate of six per centum per annum payable semi-annually on the First days of January and July in each year, as evidenced by and upon the presentation and surrender of the annexed interest coupons as the are severally matured. Both the principal of and the interest on this bond are

payable in gold coin of the United States of America, of the present standard of weight and fineness, at the office of the First Trust and Savings Bank in the City of Chicago, in the State of Illinois, or at the office of First National Bank in the City of New York, in the State of New York, without deduction for any tax or taxes, which the Company or the Trustees may be required to pay or retain therefrom under any present or future law of the United State or of any state, county or municipality therein, and the Company hereby agrees to pay such tax or taxes.

This bond is one of a series of First Mortgage Gold [14] Bonds issued and to be issued under and in pursuance of and all equally secured by a first mortgage or trust deed of indenture dated June 1st, 1909, duly executed by the Company to the First Trust and Savings Bank and Emile K. Boisot of the City of Chicago, Illinois, as Trustees, to which reference is hereby made for a description of the property, rights, privileges and franchises *mortgage,* and pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, the rights of the Company to redeem certain of said bonds before maturity and the terms and conditions of such redemption, the amount to which the total issue of said bonds is limited, and the terms and conditions upon which said bonds are secured and are to be issued—all with the same effect as if the provisions of said indenture were herein set forth.

The holder of this bond shall have no recourse for the payment thereof, or the indebtedness evidenced

thereby, or the interest thereon, or any part thereof, to any individual liability imposed by statute or otherwise upon any stockholder, officer or director of the Company; all such liability being hereby expressly waived by such holder, and by accepting this bond each successive holder assents and agrees to this provision.

Each of the bonds secured by the above-mentioned mortgage or deed of trust, maturing on or after January 1st, 1915, is redeemable before maturity as and in the manner in said mortgage or deed of trust provided, at the option of the Company, upon payment by the Company to the holder thereof, or to said the First Trust and Savings Bank, Trustee, or its successor in trust, for the time being, for the benefit of such holder, of the par thereof together with a premium of three per centum and all interest then accrued thereon, as is more fully stated and set forth in said indenture. In case of such prepayment all interest upon the principal thereof shall forthwith cease, and any and all obligations for such interest maturing thereafter shall become and shall be null and void.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the execution of the certificate hereon endorsed of the said the First Trust and Savings Bank, Trustee, under the said indenture.

IN WITNESS WHEREOF, the Bitter Root Valley Irrigation [15] Company has caused this bond to be signed by its President or Vice-presi-

dent, under its corporate seal, and attested by its Secretary, and the interest coupons hereto attached to be executed by the engraved facsimile signature of its Treasurer, as of the 1st day of July, A. D. 1909.

BITTER ROOT VALLEY IRRIGATION COMPANY,

By ————————,

President.

Attest:

————————,

Secretary.

Form of Trustee's certificate.

(Form of Trustee's Certificate.)

This bond is one of the bonds described in the within mentioned indenture.

FIRST TRUST AND SAVINGS BANK, TRUSTEE,

By ————————,

Trust Officer,

Treasurer.

Form of interest coupons.

(Form of Coupon.)

No. —— $——

On the First day of ———, A. D. 19—, the Bitter Root Valley Irrigation Company will pay to bearer, at the office of the First Trust and Savings Bank, in the City of Chicago, Illinois, or at the office of the First National Bank, in the City of New York in the State of New York, ——— Dollars in United States Gold Coin, of the present standard weight and fineness, without deduction for taxes, being six months' interest then due on its First Mortgage Gold Bond, dated July 1st, 1909, Numbered ———; unless such bond shall sooner have been

called for payment, as stated in said bond and in the mortgage or deed of trust therein mentioned.

_____,

Treasurer.

and

Authorization of mortgage or trust deed.

WHEREAS, the Board of Directors of the Company (with the concurrence and consent of the owners and holders of 17,200 shares out of the 20,000 shares which constitute the entire capital stock of the Company, authorized and outstanding, [16] expressed by their votes at a stockholders' meeting duly called and held for the purpose as aforesaid), by resolution duly adopted has authorized and directed that for the purpose of securing the payment of the said bonds and of the interest coupons thereto belonging according to the tenor and effect thereof, as hereinabove set forth, the Company shall and do make, execute, acknowledge, and deliver to the Trustees a mortgage or deed of trust substantially in the form of this indenture; and

Performance of conditions preliminary to issue and mortgage.

WHEREAS, all things necessary to happen, be done and performed to make said bonds when certified by the Bank, Trustee, and issued, the valid, binding, negotiable obligations of the Company, and this indenture a valid mortgage to secure the payment thereof, have happened, and have been done and performed in regular and due form and time as required by law;

Granting clause.

NOW, THEREFORE, This Indenture Witnesseth: That in consideration of the premises and of the acceptance or purchase by the holders thereof of bonds issued under this in-

denture, and of the sum of one dollar to it duly paid by the Trustees at or before the ensealing or delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal of and interest on all of said bonds at any time issued and outstanding, according to their tenor and effect, and in order to secure the observance and performance of all the covenants and conditions herein contained, and to declare the terms and conditions upon which said bonds shall be issued, received and held—the Company, party of the first part hereto, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, assigned, pledged, mortgaged, transferred, conveyed, confirmed and set over, and by these presents does grant, bargain, sell, alien, remise, release, assign, pledge, mortgage, transfer, convey, confirm and set over unto the Trustees, party of the second part, its, his, [17] and their successors and assigns forever, with full power of succession to and enjoyment of the privileges and franchises, including the right of possession of the Company:

1.

Description of mortgaged property.

The following described real estate, situated in Ravalli County, Montana, and known and described as follows, to wit:

(Here follows description of property.) [18]

2.

Contracts for purchase of state lands.

Land contracts and agreements concerning the following state lands, situated in Ravalli County, Montana, to wit:

(Here follows description of property.) [20]

3.

Contracts for purchase of other lands.

All the right, title and interest of the Company in and to all contracts, agreements, and options for the purchase or sale of lands, made, entered into, or acquired by the Company, or which the Company may make, enter into or acquire, including contracts for the purchase of the following lands situated in Ravalli County, Montana, to wit:

(Here follows description of property.) [22]

4.

Irrigation works and canal system.

The entire system of irrigation works owned by the Company, consisting of the dam constructed by the Company in said Ravalli County, Montana, at the outlet of Lake Como into Rock Creek, for the purpose of impounding the flood waters of said Lake Como; the water course from said Lake Como through the channel of said Rock Creek to the diverting dam of the Company, constructed at a point at or near Bean's saw mill, and about one and one-quarter miles from said Lake Como, for the purpose of diverting the waters from said Lake Como and said Rock Creek into the Company's canal, all in said Ravalli County, Montana; the canal of the Company now constructed and being constructed extending from said diverting dam northeasterly to the Bitter Root River, thence across

the said river by a pipe line or inverted syphon, thence along or near the western base of the range of mountains on the easterly side of the Bitter Root Valley, thence northerly in a direction generally parallel with the said Bitter Root River, to a point at or near Eight-Mile Creek, being a distance of approximately seventy-five miles, all in said Ravalli County, Montana, together with the flumes, pipe-lines, or syphons, bridges or trestles, constructed or being [24] constructed for carrying said waters and other waters in and along said canal, including the right of way of said canal as the same is now constructed, being constructed, or surveyed, on and over and running through the following lands, to wit: (Here follows description of property.) [25]

5.

Water rights. All the following described water rights situated in Ravalli County, Montana, now owned by the Company consisting of the rights of the Company to the use of the waters of Lake Como, Rock Creek, Lost Horse Creek, Skalkaho Creek, Willow Creek, Burnt Fork Creek and Three-Mile Creek, including the flood waters impounded and to be impounded in the dam constructed at the outlet of said Lake Como into said Rock Creek, to wit: (Here follows description of property.) [26]

6.

Entire irrigation system. All canals, ditches, laterals, weirs, head-gates, pipe-lines, syphons, bridges, trestles, dams and flumes now owned or hereafter acquired or constructed by the Company and the Company's entire irrigation system, together with all power privi-

leges, easements, and appurtenances now or hereafter used in connection therewith or thereto belonging, expressly excepting from the lien of this indenture, however, all horses, mules, wagons, buggies, automobiles, implements, tools and machinery, including the steam shovels, steam engines, cars, track, steam railroad equipment and all other goods, and material, now or hereafter owned, used or leased by the Company. [27]

7.

Purchase money mortgages owned by Company.

All purchase money mortgages and the notes thereby secured, now owned or hereafter acquired by the Company, taken in part payment for lands heretofore or hereafter sold by the Company, to the extent and amount that said mortgages and the notes thereby secured are required to be deposited with the Trustees as provided in Section 9 of Article Three and in Section 3 of Article Seven hereof, respectively.

8.

General and after-acquired property clause.

Any and all other property of every name and nature (notwithstanding the same is not now particularly described in this indenture) now owned or hereafter acquired by the Company, except as herein execpted, including all lands and rights, estates or interests therein now owned or hereafter purchased or acquired by the Company, together with all appropriations of water or water rights, now owned or that hereafter may be acquired by the Company.

Habendum.

To Have and to Hold, all and singular, the real and personal property, rights, in-

terests, privileges, easements, franchises, choses in action, water appropriations, dams, reservoirs, canals, ditches, laterals and system of irrigation works above described and hereby conveyed or intended so to be, and now owned or hereafter acquired by the Company, together with all the easements and appurtenances thereunto belonging unto the Trustees, its, his and their successors and assigns:

Trust. But in Trust, Nevertheless, for the equal and proportionate benefit and security, severally and respectively, of all and every the present and future holders of the bonds and interest coupons issued or to be issued under and secured by this indenture; and for the enforcement of the payment of said bonds and coupons when due, according to their tenor and [28] effect, and for the performance of and compliance with the covenants and conditions of this indenture, without preference, priority, or distinction as to lien or otherwise, of any one bond over any other bond by reason of priority in the execution, delivery, or negotiation thereof, or by reason of the purpose of the issuance thereof, and so that each and every bond issued and to be issued as aforesaid shall have, under and by this indenture, the same right, lien, and privilege as every other bond of the issue; and so that every such bond with the interest coupons thereto belonging shall, subject to the terms hereof, be secured hereby equally and proportionately with every other bond, as if all such bonds had been executed, certified, delivered and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security

of this indenture shall take effect from the date hereof without regard to the date of the actual issue, sale, or disposition of said bonds as if upon such date all of said bonds had been actually issued, sold and delivered and were in the hands of innocent holders for value.

And It Is Hereby Expressly Covenanted and Declared, That all such bonds, with coupons for interest thereon are to be issued, certified, delivered, received, used, and negotiated, and that the mortgaged and pledged premises, properties and franchises are to be held by the Trustees subject to and upon the furthere covenants, conditions, terms, uses, and trusts as follows, to wit:

ARTICLE ONE.

Execution, certification and delivery of bonds.

Section 1. From time to time the bonds to be issued under and secured hereby shall be executed by the Company as set forth in the preamble hereof, and by it shall be delivered for certification to the said Bank, Trustee; and thereupon the said Trustee shall certify and deliver the same as hereinafter provided. [29]

Change in officers of the Company.

In case any of the officers, who on behalf of the Company shall have signed or sealed any of the bonds issued under this indenture, shall die or shall cease to be such officer of the Company before the bonds so signed and sealed, shall have been actually certified and delivered by the said Bank, Trustee, or issued, nevertheless, upon the request of the Company, such bonds may be certified, delivered and issued as herein provided, as if the

person who signed and sealed such bonds had not died or ceased to be such officer of the Company; and also any bond may be signed and sealed on behalf of the Company by such persons as at the actual date of the execution of the bonds shall be the proper officers of the Company, although at the time of the date of the bond such persons may not have been officers of the Company. The coupons attached to each bond shall be executed by the engraved facsimile signature of the present treasurer, or of any future treasurer of the Company, and for that purpose the Company may adopt and use the engraved facsimile signature of any treasurer, notwithstanding the fact that at the time when such bonds shall actually be certified and delivered or issued he shall have ceased to be treasurer of the Company.

The said Trustee shall not certify or deliver any bond hereby secured until all coupons thereon then matured shall have been detached and canceled.

Only such of said bonds as shall bear thereon a certificate substantially in the form hereinabove recited, duly executed by the said Trustee, shall be secured by this indenture or shall be entitled to any lien or benefit hereunder. No such bond or any coupon thereunto belonging shall be valid or become obligatory for any purpose until it shall have been authenticatd by the execution of such certificate endorsed on such bond. Every such certificate of the said Trustee upon any bond executed by the Company shall be conclusive and the only evidence that the bond so certified was duly issued hereunder and

is entitled to the benefit of the trust hereby created. [30]

Total bond issue.

Section 2. The total amount of bonds that may be issued under and secured by this indenture is limited to the following amounts:

—to the amount of $30 per acre for each acre of land owned and hereafter acquired by the Company.

(1) For each and every acre of land owned by the Company as of the date of recording this indenture, or thereafter purchased or acquired by the Company, said bonds not exceeding in the aggregate, an amount equal to thirty (30) dollars per acre, for each and every acre of land so owned, purchased or acquired by the Company, may be issued, and shall be certified and delivered as provided in Sections 8 and 10 of Article Three hereof; and,

—and also to the amount of $30 for each $42 of purchase money mortgages owned.

(2) For each forty-two (42) dollars of the principal of the notes secured by purchase money mortgages, hereinbefore mentioned (each of which shall constitute a first lien to an amount not exceeding forty-two (42) dollars per acre on the premises so mortgaged), owned by the Company as of the date of recording this indenture, and delivered to the Trustees as hereinafter provided, said bonds, not exceeding in the aggregate an amount equal to thirty (30) dollars for each and every forty-two (42) dollars of the principal of said notes may be issued and shall be certified and delivered as provided in Section 9 of Article Three hereof.

Certified copy of resolution of Board of Directors to be furnished Trustee.

Before the said Bank, Trustee, shall certify and deliver said bonds, or any of them, the Company shall furnish to the said Trustee a duly certified copy of the said resolu-

tion of its Board of Directors, expressly authorizing and directing the execution, certification and delivery of said bonds, and undertaking that the same are to be issued and used solely to pay the present outstanding indebtedness of the Company, to complete and extend the Company's system of irrigation works, to develop the Company's property including its lands, to acquire additional property, including lands and the payment for lands heretofore contracted for by the Company or its assignors, capable of being irrigated from the Company's system of irrigation works, or to acquire any other property or [31] to construct any other works within the corporate objects and powers of the Company.

Such resolution, evidenced as aforesaid, shall, subject to the provisions hereinafter in Sections 8, 9 and 10 of Article Three hereof specified, be deemed and shall be taken to be full authority and direction to the said Bank, Trustee, for its certification and delivery of such bonds hereunder.

Replacing bonds mutilated or destroyed.

Section 3. In case any bond issued hereunder with the coupons thereto appertaining, shall become mutilated or be destroyed, the Company, in its discretion, may execute, and thereupon the said Bank, Trustee, shall certify and deliver a new bond of like tenor and date, including coupons, bearing the same distinctive number or numbers, in exchange and substitution for and upon cancellation of the mutilated bond and its coupons, or in lieu of and substitution for the bond and its coupons so destroyed. In case of destruction, the applicant for a substituted bond shall furnish to the

Company and to the said Trustee evidence of the destruction of such bond and its coupons, and of the ownership thereof, which evidence shall be satisfactory to the Company and to the said Trustee; and said applicant shall also furnish indemnity satisfactory to the Company and to the said Trustee.

Temporary bonds.

Section 4. Until the bonds to be issued under and secured by this indenture, including the bonds numbered from 1701 upwards, can be prepared and engraved, the Company may execute, and upon its request the said Bank, Trustee, shall certify and deliver, in lieu of such engraved bonds and subject to the same provisions, limitations and conditions, printed or lithographed bonds substantially of the tenor of the bonds to be issued as hereinbefore provided, except that every such temporary bond shall bear upon its face the words "Temporary Bond, exchangeable for engraved bonds," and shall recite that it is one of a series of temporary first mortgage gold bonds of like date and tenor and is exchangeable for [32] engraved coupon bonds for the aggregate principal sum thereof, and of like maturity, as in this section provided. Said temporary bonds shall be numbered from 1 upwards, and shall be of the denomination or denominations fixed by the Board of Directors of the Company, and shall have only the first coupon attached. Upon surrender of any such temporary bond for exchange, the Company, at its own expense, shall execute and deliver to the said Trustee, and upon cancellation of such surrendered temporary bond said Trustee shall certify and deliver in exchange therefor, engraved

bonds with interest coupons thereto attached, of the numbers noted on said temporary bond, and in the form of the denomination hereinbefore prescribed, and until so exchanged such temporary bond shall be entitled to the same security and rights as the engraved bonds to be issued hereunder.

Redemption of bonds.

Section 5. The Company may at its option pay, redeem and discharge any of the bonds issued under and secured by this indenture, maturing after January 1st, 1915, by paying in cash the principal thereof at par, together with a premium of three per centum thereof and also all interest accrued at the time fixed for the prepayment, as follows:

Bonds maturing January 1st, 1916, January 1st, 1917, and January 1st, 1918, respectively, on any interest payment date before maturity, on or after January 1st, 1915; bonds maturing January 1st, 1919, on any interest payment date before maturity; bonds maturing after January 1st, 1919, on such interest payment date or dates before maturity as the Board of Directors of the Company shall hereafter determine.

(1) The Company shall exercise said option and give notice of any proposed redemption thereunder as follows:

Notice of.

Whenever the Board of Directors of the Company shall desire to redeem any of said bonds, then subject to redemption as aforesaid, they shall, prior to the delivery of the notice hereinafter provided for, adopt a resolution setting forth the amount of bonds (at their par value) desired to be

redeemed, [33] and specifying the numbers of the bonds so to be redeemed, beginning with the lowest number of the maturity or respective maturities which, or a part of which, respectively, the Board of Directors of the Company shall desire to redeem; and a certified copy of such resolution shall be delivered to said Bank, Trustee, and also to Trowbridge & Niver Co. (Incorporated) of Chicago, Illinois. The Company shall, not less than thirty (30) days prior to the date fixed for such prepayment and redemption, deliver to said Bank, Trustee, and also to said Trowbridge & Niver Co. (Incorporated), a certified copy of said resolution, together with written notice of its election to make such prepayment and redemption. Such notice shall state that upon presentation of said bonds with all coupons belonging thereto—both matured and unpaid and subsequently maturing—to the said Trustee, such designated bonds, will be paid in cash at par, with a premium of three per centum upon the principal, together with all interest accrued to the date so fixed for prepayment.

(2) Upon delivery of said notice and certified copy of said resolution to said Bank, Trustee, and to said Trowbridge & Niver Co. (Incorporated) each and every bond designated therein shall become and shall be due and payable at the date specified in such notice, together with all interest obligations which shall have accrued upon said date, anything in this indenture or in any bond or interest coupon or coupons contained to the contrary notwithstanding; and after the date of pay-

Maturity of bonds after notice.

ment so specified, if the deposit hereinafter provided for shall have been made, no interest shall accrue upon or with respect to any bonds so designated, nor shall any coupon representing any such subsequently accruing interest, be of any force or effect. The Company and the Trustees, upon the deposit by the Company of the proper amount with the said Bank, Trustee, for the benefit of the holders of the bonds designated in said notice for prepayment and redemption, shall be privileged to consider said bonds as redeemed [34] from such holders. No such deposit shall draw interest, and every bond and coupon for the redemption of which any such deposit shall have been made, shall thereafter be excluded from any participation in the lien and security afforded by this indenture, and the holder thereof shall look for payment solely to said deposit in the hands of the said Trustee, which shall be used by said Trustee in the payment thereof upon the presentation and delivery to it of said bond, together with all unpaid coupons thereto belonging.

All bonds prepaid or redeemed under the provisions of this section, with all coupons thereto belonging, shall be forthwith canceled and surrendered to the Company.

Remedies confined to parties and bondholders.

Section 6. Nothing in this indenture or in the bonds issued hereunder, expressed or implied, is intended or shall be construed to give to any person or corporation other than the parties hereto and the holders of bonds issued under and secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this

indenture, or under any covenant, conditions, or provisions herein contained; all the covenants, conditions, and provisions herein being intended to be, and being for the sole and exclusive benefit of the parties hereto and of the holders of the bonds hereby secured.

ARTICLE TWO.

Collection and application of funds from pledged securities.

Section 1. The Bank, Trustee, shall be entitled to collect and receive the principal or any part thereof of any and all of the securities hereby mortgaged and pledged, as the same becomes due and payable; the Trustees may employ either Cobe & McKinnon, of the City of Chicago, Illinois, or the Assets Realization Company of the City of Camden, New Jersey, or such other person or corporation as the Trustees may select as their agent in making such collection, either [35] before, during or after any default under this indenture. The Trustees shall apply the moneys so collected and received, first, towards the payment of the next installment of interest maturing on said bonds, second towards the payment of the principal of any of said bonds maturing by their terms on said interest payment date and, third, the residue thereof, if any, towards the prepayment and redemption of bonds issued under and secured by this indenture as follows: whenever there shall accumulate in the hands of the Bank, Trustee, as aforesaid money in excess of the amount of any installment of interest or of the principal and interest thereon of the bonds secured hereby to be paid within six calendar months thereafter, such excess moneys shall, upon the re-

quest of the Company, evidenced by a certified copy of a resolution of the Board of Directors of the Company, delivered to the Trustees not less than thirty (30) days prior to the date fixed in said resolution for prepayment or redemption, be used and employed in the prepayment or redemption of bonds as provided in said resolution; said resolution shall specify the interest payment date on which redemption is to be made and shall also designate bonds sufficient to absorb said excess moneys, then subject to redemption, which the Board of Directors of the Company shall desire to redeem; a certified copy of said resolution shall also be delivered by the Company to the said Trowbridge & Niver Co. (Incorporated) not less than thirty (30) days prior to the date fixed for such prepayment and redemption; the provisions of subdivision (2) of Section 5 of Article One of this indenture shall apply to the redemption of bonds by the Trustees under the provisions of this Article Two.

Company shall collect and retain interest on its purchase money mortgages, so long as not in default.

Section 2. The Company shall be entitled to collect, receive and retain all interest accruing upon the securities, hereby mortgaged and pledged, and to receive from the Bank, Trustee, the interest coupons attached to any of said securities, at [36] any time within thirty (30) days prior to the maturity of said coupons, until such time as the Company shall have made default or defaults in the performance of any of the terms, conditions and covenants of this indenture to be performed by the Company, and written notice of such default shall

have been given by the Trustees to the Company or shall have been given by the holders of not less than five (5) per cent, in amount of the bonds then outstanding and secured by this indenture to the Trustees and the Company; in event of any such default or defaults upon the part of the Company and written notice thereof, as aforesaid, the Company, during the continuance of such default or defaults, shall not be entitled to collect, receive or retain any of the interest on the said securities hereby mortgaged and pledged, or to receive from the Trustees the interest coupons attached to said securities or any of them, and the Trustees thereafter and during the continuance of such default or defaults shall require all interest maturing upon the securities mortgaged and pledged by this indenture to be paid to them direct, and shall retain and collect all said coupons.

ARTICLE THREE.

The Company covenants as follows:

Covenants of Company.

Section 1. That duly and punctually it will pay the principal of and interest on every bond issued under and secured by this indenture at the dates and the places and in the manner mentioned in such bonds and coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes which the Company or the Trustees may be required to pay or retain therefrom under or by reason of any present or future law of the United States or of any state or county or municipality or

—to pay bonds and interest.

other governmental subdivision therein, and that it will pay such tax or taxes. The interest on the bonds [37] shall be payable only upon presentation and surrender of the several coupons for such interest, as they respectively mature, and when paid such coupons shall forthwith be canceled and returned to the Company.

—to maintain priority of lien of mortgage.

Section 2. That the lien of this mortgage or trust deed is a first and prior lien upon all the property and franchises hereinabove described, granted, mortgaged and pledged; that it will allow no lien to be created or to be filed upon any portion of its said property and franchises; and that it will at all times keep and preserve the lien of this mortgage or trust deed as the first, prior and only lien upon each and every part of its real and personal property hereinabove described, and hereby granted, mortgaged and pledged, and upon which a lien is hereby created; and that duly and punctually it will perform each and every of its contracts with any settler or other person for the furnishing or supplying of water or power from its said irrigation and reservoir system, or for the sale of lands, and each and every of the covenants and agreements contained in its contracts and agreements concerning state lands, and will duly perform every duty imposed upon it by law, in such manner that the prior lien of this mortgage or trust deed shall never be displaced or endangered.

—to make further assurance.

Section 3. That it will, on demand of the Trustees, do all acts necessary or proper to keep valid the lien created hereby, and that at any

future time and as often as may be necessary, it will, on reasonable demand of the Trustees, do, execute, acknowledge and deliver, or cause to be done, executed, acknowledged and delivered all and every such further acts, deeds, conveyances, assignments, transfers and assurances in the law for the purpose of subjecting to the lien and operation of this indenture any and all property and rights in respect to which the bonds secured hereby are issued, and for, in all respects, effectuating the intention of these presents, and for duly conveying, assigning and confirming unto **[38]** the Trustees all and singular the hereditaments and premises, estates and property hereby mortgaged or pledged, or intended so to be, or which the Company may hereafter become bound to convey or assign to the Trustees, as the Trustees shall reasonably require; that it will diligently preserve the rights and franchises granted to or conferred upon it by the laws or ordinances of the state, city, town or municipality wherein any of its property is or shall be situated; and that it will at all times keep and maintain its canals and irrigation and other works in thorough repair, working order and condition, and that it will, from time to time, make all needful and proper repairs and replacements so that the business of the Company may at all times be properly conducted.

—to pay taxes,

Section 4. That from time to time it will pay and discharge all taxes, assessments and governmental charges (the lien whereof would be prior to the lien hereof), lawfully imposed upon the premises or property subject to this indenture,

or upon any part thereof, or upon the income and profits thereof, and also all taxes, assessments and governmental charges lawfully imposed upon the lien or interest of the Trustees in respect to said premises or property, so that the lien and priority of this indenture shall be fully preserved at the cost of the Company without expense to the Trustees or the bondholders; provided, however, that the Company shall have the right, by legal proceedings, conducted in good faith, to contest any such tax, assessment or governmental charge, and pending such contest may delay or defer the payment thereof.

—to employ bonds for specific purpose authorized and place proceeds in special fund.

Section 5. That it will not issue, use, negotiate, sell or dispose of any bonds hereby secured to an amount or in any manner, or for any purpose other than in accordance with the provisions of this indenture; and that as rapidly as said bonds are issued, used, negotiated, sold, or disposed of it will place the proceeds derived therefrom or obtained thereon, in a separate fund to be designated "First Mortgage Bond [39] Fund," which shall be used solely for the purposes or any of them mentioned in Section 2 of Article One hereof.

—to render annual itemized statements to Trustees.

Section 6. That it will, on or before the fifteenth day of January of each year during the life of any of the bonds issued under and secured by this indenture, file with the Trustees an itemized statement, signed and sworn to by the president, vice-president or secretary of the Company, setting forth, for the period of the preceding calendar year:

(1) The number of said bonds issued, sold, pledged or negotiated, and the number then outstanding and the amount realized therefrom or obtained thereon and placed in said "First Mortgage Bond Fund" mentioned in Section 5 of this Article Three;

(2) The character and amount of construction work done in the preceding calendar year, with the actual cost thereof, and whether and to what extent mechanics' liens have attached to the property of the Company on account of such construction work;

(3) The description and location of the lands acquired or contracted to be purchased by the Company in the preceding calendar year, together with the amount paid therefor or thereon; and attached to such statement shall be a certificate of counsel learned in the law, that the Company has acquired good and merchantable title to the lands so acquired, or that the contract so made is legally sufficient, as the case may be.

(4) The description and location of the lands sold or contracted to be sold by the Company in the preceding calendar year, together with the amount paid or contracted to be paid therefor or thereon; and in case of deferred payment, how the same is evidenced and secured.

(5) The amount disbursed during the preceding calendar year from the said "First Mortgage Bond Fund" aforesaid, and the balance remaining therein at the date of said statement. [40]

—to render financial statements to Trustees on request.

Section 7. That at all times hereafter, upon the written request of the Trustees, it will furnish and deliver to the Trustees,

as often and in such form as may be required by them, a statement in writing, attested by the signatures of its president or vice-president and of its treasurer, showing accurately the financial condition of the Company, the character, amount and location of lands owned by it, and the general condition, with respect to state of completion or incompletion and repair of its irrigation works or system.

Certification of bonds issued on land owned by Company at date of recording this mortgage.

Section 8. That prior to the certification of the bonds or any part thereof authorized by Paragraph (1) of Section 2, Article One hereof, the Company shall deliver to the Trustees, the certified copy of the resolution provided for in Section 2 of Article One hereof, and a statement made by the President, Vice-President or Secretary of the Company, under oath, setting forth the number of acres of land capable of being irrigated by or from the Company's irrigation works owned by the Company in fee simple (not including state lands and other lands, which the Company has contracted to purchase or in which the Company has an interest, but to which the Company does not hold title in fee simple) as of the date of recording this indenture, together with a certificate of counsel learned in the law, to be designated by said Trowbridge & Niver Co. (Incorporated) that the Company, as of said date, held good title to said lands free and clear of all liens or incumbrances except the lien of this indenture and taxes not due. Upon the delivery by the Company to the Trustees of the above mentioned statement and certificate, and after the delivery of the copy

of said resolution, the said Bank, Trustee, shall forthwith certify and deliver to the Company or upon its order, such an amount of said bonds as the Company may in writing request, not exceeding in the aggregate, however, an amount, at par, equal to Thirty (30) Dollars per acre for each and every acre of land so owned by the Company as of said date as shown by said sworn [41] statement made by the President, Vice-President or Secretary of the Company; the said Bank, Trustee, shall thereupon certify and deliver as aforesaid any bonds of any maturity or maturities, which the Company shall in writing designate, not exceeding in the aggregate the amount of bonds authorized by this Section 8, to be certified and delivered.

Certification of bonds on the purchase money mortgages owned by Company at date of recording this mortgage.

Section 9. That prior to the certification of the bonds authorized by Paragraph (2) of Section 2, Article One hereof, the Company shall deliver to the Trustees, duly assigned and endorsed to said Bank, Trustee, or its order, purchase money mortgages, and the notes thereby secured, each of which mortgages shall constitute a first lien on the premises covered thereby, to an amount or amounts not exceeding Forty-two (42) Dollars per acre, as specified in said Paragraph (2) of Section 2, Article One hereof, together with a certified copy of the resolution provided for in Section 2 of Article One hereof, a certificate of counsel learned in the law to be designated by said Trowbridge & Niver Co. (Incorporated) that such mortgages and the notes hereby secured, and so delivered to the Trustees, with the

endorsement or stipulation thereon, constitute a first lien on the said premises covered thereby, and a statement made by the President, Vice-President or Secretary of the Company, under oath, setting forth the aggregate amount of said purchase money mortgages and the aggregate number of acres of land covered by said mortgages. Upon the delivery by the Company to the Trustees of said purchase money mortgages and notes and said certificate of counsel, designated as aforesaid, and said sworn statement, and after the delivery of the copy of said resolution, the said Bank, Trustee, shall forthwith certify and deliver to the Company or upon its order, in addition to the bonds authorized and directed to be certified and delivered in accordance with the provisions of Section 8 of this Article Three, such an amount of said bonds as the Company may in writing request, not exceeding in the aggregate, however, **[42]** an amount, at par, equal to Thirty (30) Dollars for each Forty-two (42) Dollars of the principal of said notes secured by said purchase money mortgages, as shown by said sworn statement; the said Bank, Trustee, shall certify and deliver, as aforesaid, any bonds of any maturity or maturities remaining uncertified and unissued, which the Company shall in writing designate, not exceeding in the aggregate the amount of bonds authorized by this Section 9 to be certified and delivered.

In event the aggregate amount of the unpaid notes secured by said purchase money mortgages shall exceed the amount of Forty-two (42) Dollars per

acre as aforesaid, the lien thereof in excess of said amount of Forty-two (42) Dollars per acre, shall by appropriate endorsement or stipulation on said note, or notes, evidencing such excess, be made secondary and subordinate to the lien of said notes secured by said mortgages to the amount of not to exceed Forty-two (42) Dollars per acre; and constituting a first lien as aforesaid; and when so endorsed, as constituting a secondary lien as aforesaid, said note, or notes, representing such excess, shall be exhibited to the Bank, Trustee, and may then be retained by the Company free from the lien of this indenture. In event the said purchase money notes, constituting a first lien upon said mortgaged premises and delivered to and retained by the Trustees as aforesaid, shall exceed the amount of Forty-two (42) Dollars per acre as aforesaid, then upon the payment to the Trustees of said notes, constituting a first lien and delivered to the Trustees as aforesaid, the excess thereof, over and above the said sum of Forty-two (42) Dollars per acre, shall upon written request, be paid over to the Company.

Excess of purchase money mortgage notes over $42 per acre, to be secondary in lien and retained by the Company.

Section 10. That prior to the cerification of the bonds authorized by Paragraph (1) of Section 2, Article One hereof to be issued for lands purchased or acquired by the Company after the date of recording this indenture (including [43] state lands and other lands, which the Company had theretofore contracted to purchase or in which the Company had an interest on said date), the Company shall deliver to the Trus-

Certification of bonds issued on after acquired lands.

tees the certified copy of the resolution provided for in Section 2 of Article One hereof and a statement by the President, Vice-President or Secretary of the Company, under oath, setting forth the number of acres of lands so purchased or acquired by the Company, for which no bonds have been issued as herein provided, together with a certificate of counsel learned in the law that the Company on the date of said statement held good title to said land, free and clear of all liens and encumbrances, except the lien of this indenture and taxes and assessments not due. Upon the delivery by the Company to the Trustees of the above mentioned statement and certificate, and after the delivery of the copy of said resolution, the said Bank, Trustee, shall forthwith certify and deliver to the Company, or upon its order, such an amount of said bonds, as the Company may in writing request, not exceeding in the aggregate, however, an amount, at par, equal to Thirty (30) Dollars per acre for each acre of land so acquired or purchased by the Company as shown by said statement; the said Bank, Trustee, shall thereupon certify and deliver, as aforesaid, any bonds of any maturity, or maturities, remaining uncertified and unissued, which the Company shall in writing designate, not exceeding in the aggregate the amount authorized by this Section 10 to be certified and delivered.

ARTICLE FOUR.

Status of coupons transferred after maturity.

Section 1. No coupon belonging to any bond hereby secured, which in any way at or after maturity shall have been trans-

ferred or pledged separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from [44] this indenture, except after the prior payment in full of the principal of the bonds issued hereunder and of all coupons and interest obligations not so transferred or pledged.

Entry by Trustees on Company's default.

Section 2. In case (1) default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of ninety (90) days, or in case (2) default shall be made in the payment of the principal of any bond hereby secured, or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the Company, and any such last mentioned default shall have continued for the period of ninety days after written notice thereof shall have been given to the Company by the Trustees or by the holders of five per cent in amount of the bonds then outstanding and hereby secured—then and in each and every such case the Trustees personally, or by their agents or attorneys, may enter into and upon and take full possession of the canals, ditches, reservoirs and all property, rights and franchises hereby mortgaged and pledged, or intended so to be, and hold, use, manage, maintain and operate the same, and collect and receive all moneys and revenues arising from such possession and man-

agement, and may exclude the Company, its agents and servants, wholly therefrom, and having and holding the same may use, operate, manage and control said irrigation works and other premises, either personally, or by their superintendents, managers, receivers, agents and servants or attorneys, to the best advantage of the holders of the bonds hereby secured; and upon every such entry the Trustees at the expense of the trust estate, from time to time, may make all necessary or proper repairs, renewals and replacements, and useful alterations, additions, betterments and improvements to said irrigation works and other premises as to them may seem judicious; and after deducting [45] the expenses of operating said irrigation works and premises, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the said premises and property, or any part thereof, as well as just and reasonable compensation for their own services and for all agents, clerks, servants and other employees by them properly engaged and employed, the Trustees shall apply the moneys and revenues arising as aforesaid as follows:

Application of revenues by Trustees in possession.

In case the principal of any of the bonds hereby secured shall not have become due, to the payment of the interest in default, in the order of the maturity of the installments of such interest, with interest on the overdue installments at the rate of six per centum per annum; such payments to be made

ratably to the persons entitled thereto, without discrimination or preference.

In case the principal of any of the bonds hereby secured shall have become due, by declaration or otherwise, first to the payment of the accrued interest (with interest on the overdue installments thereof at the rate of six per centum per annum), in the order of the maturity of the installments, and next to the payment of the principal of all said bonds then matured and unpaid; in every instance such payment to be made ratably to the persons entitled to such payment without any discrimination or preference.

These provisions, however, are not intended in anywise to modify, but are subject to the provisions of Section 1 of this Article Four.

Restoration of possession to Company.

In case all the said payments shall have been made in full and no suit to foreclose this mortgage shall have been begun, the Trustees, after making such provision as to them may seem advisable for the payment of the next semi-annual installment of interest to fall due, and of the principal of said bonds next to mature shall restore to the Company the [46] possession of such property, rights and franchises hereby mortgaged and pledged.

The power of entry herein provided for may be exercised as often as occasion shall arise, pending this trust, and the Trustees may continue, so long as any said default shall continue, to exercise the power herein granted for such period or periods as they may deem expedient, unless and until the hold-

ers of a majority in interest of the bonds secured hereby then outstanding shall otherwise in writing request.

Section 3. In case a default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, or in the due observance and performance of any other covenant, agreement or condition required to be kept or performed by the Company hereunder, and any such default shall have continued for the period of ninety days, as aforesaid, or in case default shall be made in the payment of the principal of any of the bonds hereby secured, then and in every case of such default, upon the written request of the holders of a majority in amount of the bonds hereby secured then outstanding, the Trustees, by notice in writing delivered to the Company, shall declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding. This provision, however, is subject to the condition that, if at any time after the principal of said bonds shall have been so declared due and payable, and before any sale of the mortgaged premises shall have been made, all arrears of interest upon all the bonds secured hereby, with interest on overdue installments of interest at the rate of six per centum per annum, shall either be paid by the Company or be collected out of the mortgaged premises, and all de-

Acceleration of maturity of bonds on Company's default.

faults in the observance of any other covenant of this indenture shall have been made good, [47] then and in such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the Company and to the Trustees may waive such default and its consequences; but no such waiver shall extend to or shall affect any subsequent default, or impair any right consequent thereon.

Restoration of rights of parties.

In case, by foreclosure, entry, or otherwise, the Trustees shall have proceeded to enforce any rights under this indenture, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other reason, or shall have been determined adversely to the Trustees, then and in every such case, the Company and the Trustees respectively shall be restored to their former position and rights hereunder with respect to the mortgaged premises, and all rights, remedies and powers of the Trustees shall continue as if no such proceeding had been taken.

Other remedies in event of Company's default.

Section 4. In case (1) default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of ninety days; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the Company, and any such last men-

tioned default shall have continued for the period of ninety days after written notice thereof shall have been given to the Company by the Trustees, or by the holders of five per cent in amount of the bonds hereby secured—then, and in each and every such case of default the Trustees, with or without entry, personally or by attorney, in their discretion either:

—sale by Trustees.

(a) May, and upon the written request of the holders of a majority in amount of the bonds hereby secured then outstanding, shall sell and dispose of all and singular the premises, property, rights, privileges, interests, franchises, immunities [48] and exemptions hereby mortgaged or conveyed, or intended so to be, at public auction in the City of Chicago, in the State of Illinois, upon such terms as to credits, partial credits and security for payment as the Trustees may deem proper or expedient, having first given public notice of the time, place and terms of sale or sales as hereinafter provided.

—foreclosure.

(b) May, in the manner provided by law, institute and prosecute such proceedings as may be necessary to enforce the foreclosure and sale of all and singular the property and premises mortgaged and pledged, including rights, franchises, exemptions, and interests and appurtenances, and other real and personal property of every kind, and all right, title and interest, claim and demand therein, and right of redemption thereof, in one lot and as an entirety, unless a sale in parcels shall be required under the provisions of Section 6 of this Article Four; or

(c) May proceed to protect and to enforce their rights and the rights of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the enforcement of any other appropriate legal or equitable remedy, as the Trustees, being advised by counsel learned in the law, shall deem most effectual to protect and enforce any of their rights or duties hereunder.

—suits at law or in equity.

Action by Trustees on request of holders of a majority in amount of outstanding bonds.

Section 5. Upon the written request of the holders of a majority in amount of the bonds hereby secured and then outstanding, in case of any continuing default, as specified in Section 3 of this Article Four, it shall be the duty of the Trustees, upon being indemnified as hereinafter provided, to take all steps needful for the protection and enforcement of their rights and the rights of the holders of the bonds hereby secured, and to exercise the powers of entry and sale herein conferred, or to take appropriate judicial proceedings by action, [49] suit or otherwise, as the Trustees, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the bonds hereby secured;

Control by the holders of a majority in amount of the outstanding bonds.

But, anything in this indenture to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and then outstanding, from time to time, shall have the right to waive or to instruct the Trustees to waive any default of the Company

hereunder (except default in payment of the principal of said bonds at maturity); to direct and to control the action of the Trustees, and the method and the place of conducting any and all proceedings for any sale of the premises and property subject to this indenture, or for the foreclosure of this indenture, or for the appointment of a receiver, or any other proceedings hereunder; to restore to the Company possession of its property hereby mortgaged and pledged in the event the Trustees shall have exercised their right of entry hereunder; and generally to direct the Trustees to discontinue any proceedings which they may have taken to enforce in any way the provisions hereof; and to revoke and annul any declaration or election accelerating the maturity of the principal of said bonds on account of any default so waived.

Property to be sold as an entirety—exceptions.

Section 6. In the event of any sale, whether made under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, or otherwise, the whole of the property subject to this indenture shall be sold in one parcel and as an entirety, including all the rights, title, estates, interests, equipment, leases, leasehold interests, contracts and other real and personal property of every name and nature, unless such sale as an entirety is impracticable by reason of some statute or cause, or unless the holders of a majority in amount of the bonds hereby secured then outstanding shall in writing request the Trustees to cause said premises to be sold in parcels, in which case the sale shall be made in such parcels, as may be specified

in such request; and this [50] provision shall bind the parties hereto, and each and every of the holders of the bonds and coupons hereby secured, or intended so to be.

Notice of sale.

Section 7. Notice of any such sale pursuant to any provision of this indenture, shall state the time and place when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive calendar weeks prior to such sale in a newspaper published in the City of Chicago, Cook County, Illinois, and in a newspaper published in the Town of Hamilton, Ravalli County, Montana, and otherwise as may be required by law.

Adjournment of sale.

Section 8. The Trustees may adjourn, or may cause to be adjourned, from time to time, any sale about to be made of the mortgaged premises, by announcement of such adjournment at the time and place appointed for such sale or for such adjourned sale or sales; and without further notice or publication, such sale may be made at the time and place to which the same shall be so adjourned.

Conveyance to purchaser.

Section 9. Upon the completion of any sale or sales under this indenture, the Trustees in their own names or in the name of the Company, shall execute, acknowledge, and deliver to the accepted purchaser or purchasers a good and sufficient deed, or good and sufficient deeds or other instruments, conveying, assigning and transferring the properties and franchises sold, subject severally and

respectively to the lien thereon, if any, which then shall be prior and superior to the lien of this indenture. The Trustees and their successors hereby are appointed the true and lawful attorneys irrevocably of the Company, in its name and stead to make all necessary conveyances and assignments of property thus sold; and for that purpose they may execute all necessary deeds and instruments of assignment and transfer, and may substitute one or more persons with like power; the Company hereby ratifying [51] and confirming all that their said attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any sale or sales made under or by virtue of this indenture shall operate to divest all right, title, interest, claim and demand whatsoever, either in law or in equity, of the Company, of, in and to the premises and property so sold, and shall be a perpetual bar both at law or in equity, against the Company, its successors or assigns, and against any and all persons claiming or to claim the premises or property sold, or any part thereof, from, through or under the Company, its successors or assigns.

Personal property made real estate hereunder.

The personal property and chattels conveyed or intended to be conveyed by or pursuant to this indenture, shall be real estate for all the purposes of this indenture, and shall be held and be taken to be fixtures and appurtenances of the said irrigation works or system, or other works of the Company as the case may be, and part thereof, and except as herein otherwise provided, are

to be used and sold therewith and not separate therefrom.

Purchaser not responsible for application of purchase money.

Section 10. The receipt of the Trustees for the purchase money paid at any such sale shall be a sufficient discharge therefor to any purchaser of the property or any part thereof, sold as aforesaid; and no such purchaser or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication or non-application of any such purchase money or any part thereof, or be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale.

Maturity of all bonds in case of sale.

Section 11. In case of any such sale under the foregoing provisions of this Article, the principal sums of the bonds hereby secured, if not previously due, shall immediately thereupon [52] become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

Application of of proceeds of sale.

Section 12. The purchase money, proceeds or avails of any such sale, together with any other sums which then may be held by the Trustees under any of the provisions of this indenture as part of the trust estate or the proceeds thereof, shall be applied as follows:

—expenses of sale, compensation and reimbursement of Trustees.

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the Trustees, their

agents, attorneys and counsel, and of all expenses, liabilities or advances made or incurred by the Trustees, and to the payment of all taxes, assessments, or liens prior to the lien of these presents, except the superior liens and any taxes, assessments, or other charges subject to which the property shall have been sold.

—principal and interest of bonds.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest with interest on the overdue installments of interest at the rate of six per cent per annum), and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest, subject, however, to the provisions of Section 1 of this Article Four.

—surplus to Company.

Third. To the payment of the surplus, if any, to the Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

Application of bonds and coupons on purchase price.

Section 13. Upon any such sale any purchaser, for or in settlement or payment of the purchase price of the property purchased, shall be entitled to use and to apply any bonds at par, and any matured and unpaid coupons hereby secured, by [53] presenting such bonds

and coupons in order that there may be credited thereon the sums applicable to the payment thereof out of the net proceeds of such sale to the owner of such bonds and coupons, as his ratable share of such net proceeds, after the deduction of costs, expenses, compensations, and other charges; and thereupon such purchaser shall be credited, on account of such purchase price payable by him, with the portion of such net proceeds that shall be applicable to the payment of, and that shall have been credited upon, the bonds and coupons so presented; and at any such sale, any bondholders may bid for and purchase such property and may make payment therefor as aforesaid, and upon compliance with the terms of sale may hold, retain, and dispose of such property without further accountability.

Company, on default, to pay Trustees full amount of bonds and interest.

Section 14. The Company covenants that (1) in case default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and such default shall have continued for the period of ninety days, or (2) in case default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether upon the absolute maturity of said bonds or upon declaration as authorized by this indenture, or upon a sale as set forth in Section 11 of this Article Four,—then, upon demand of the Trustees, the Company will pay to the Trustees, for the benefit of the holders of the bonds and coupons hereby secured, then outstanding, the whole amount that then shall have become due and payable on all

such bonds and coupons then outstanding, or interest or principal, or both, as the case may be, with interest at the rate of six per centum per annum upon the overdue principal and installments of interest; and in case the Company shall fail to pay the same forthwith upon such demand, the Trustees, in their own names and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

The Trustees, so far as may be authorized by law, shall be [54] entitled to sue and recover judgment as aforesaid, either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture, and the right of the Trustees to sue and recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the property subject to this indenture, and of the application of the proceeds of sale to the payment of the debt hereby secured, the Trustees, in their own names and as trustees of an express trust, shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. No recovery of any such judgment by the Trustees, and no levy of any execution upon any such judgment upon property subject to this indenture, or upon any other property, shall

—suit by Trustees to recover amount of bonds and interest.

in any manner or to any extent affect the lien of this indenture upon the property or any part of the property subject to this indenture, or any rights, powers or remedies of the Trustees hereunder, or any lien, rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers and remedies of the Trustees and of the bondholders shall continue unimpaired as before.

Any moneys thus collected by the Trustees under this section shall be applied by the Trustees towards payment of the amounts then due and unpaid upon such bonds and coupons in respect or for the benefit of which such moneys shall have been collected, ratably and without any preference or priority of any kind (except as provided in Section 1 of this Article Four), according to the amounts due and payable upon such bonds and coupons, respectively, at the date fixed by the Trustees for the distribution of such moneys, upon presentation of the several bonds and coupons and stamping such payment [55] thereon, if partly paid, and upon surrender thereof, if fully paid.

Waiver of extension laws.

Section 15. The Company will not at any time insist upon or plead, or in any manner whatever claim or take the benefit or advantage of, any stay or extension law, now or at any time hereafter in force, nor will it claim, take or insist upon, any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the property or any part of the property subject to this indenture, prior to any sale or sales thereof to be made pursuant to any provi-

sion herein contained, or to the decree, judgment, or order of any court of competent jurisdiction; nor, after any such sale or sales, will it claim or exercise any right under any statute enacted by any state, or otherwise, to redeem the property so sold or any part thereof, and it hereby expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay or impede the execution of any power herein granted and delegated to the Trustees, but that it will suffer and permit the execution of every such power as if no such law or laws had been made or enacted.

Rights of Trustees in event of judicial proceedings.

Section 16. Upon filing a bill in equity, or upon commencement of any other judicial proceedings, to enforce any right of the Trustees or of the bondholders under this indenture, the Trustees shall be entitled to exercise the right of entry, and also any and all other rights and powers, herein conferred and provided to be exercised by the Trustees upon the occurrence and continuance of default, as hereinbefore provided; and, as matter of right, the Trustees shall be entitled to the appointment of a receiver of the premises and property subject to this indenture, or any part thereof, and of the earnings, income, and revenues, rents, issues or profits thereof, with such powers as the court making such appointment shall confer. All rights of action under this indenture, or under any of [56] said bonds or coupons, may be enforced by the Trustees without the possession of any of the bonds or coupons or the produc-

—Receivership.

tion thereof on any trial or other proceedings relative thereto.

Exclusive right of action in Trustees, except on certain conditions.

Section 17. No holder of any bond or coupon hereby secured shall have the right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust hereunder, or for the appointment of a receiver or for any other remedy hereunder, unless such holder previously shall have given to the Trustees written notice of such default, and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of a majority in amount of the bonds hereby secured, then outstanding, shall have made written request upon the Trustees, and shall have afforded to them a reasonable opportunity, either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in their own name; nor, unless, also, they shall have offered to the Trustees security and indemnity satisfactory to them, against the costs, expenses and liabilties to be incurred therein or thereby; nor unless, notwithstanding such notice, opportunity, request and indemnity, the Trustees have for an unreasonable time (not exceeding thirty days) neglected to act or refused to act; and such notification, request, and offer of indemnity are hereby declared, in every such case, at the option of the Trustees, to be conditions precedent to the execution of the powers and trusts of this indenture for the benefit of the bondholders, and to any action or cause of action for foreclosure or for the appointment of a reciver or for any other remedy

hereunder; it being understood and intended that no one or more holders of bonds and coupons issued under and secured hereby shall have any right in any manner whatever by his or their action to affect, disturb, or prejudice the lien of this indenture, or to enforce any right hereunder except in the manner herein provided and that all proceedings at law or in equity shall be [57] instituted, had, and maintained only in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

Each remedy hereunder cumulative.

Section 18. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustees, or to the holders of bonds hereby secured, is intended to be exclusive of any other remedies; but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

Section 19. No delay or omission of the Trustees, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein, and every power and remedy given by this Article to the Trustees or to the bondholders, may be exercised as often as may be deemed expedient, by the Trustees or by the bondholders.

ARTICLE FIVE.

Non-liability of directors, stockholders, and officers of Company.

No recourse under or upon any obligation, covenant or agreement contained in this indenture, or in any bond or coupon hereby secured, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer or director of the Company, or of any successor corporation, either directly or through the Company, or any receiver thereof, by the enforcement of any stock or other assessment or subscription, or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly agreed and understood that this indenture, and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to, or be incurred by, the incorporators, stockholders, officers or directors [58] of the Company or of any successor corporation, or any of them, because of the incurring of the indebtedness hereby authorized, or any other indebtedness, or under or by reason of any of the obligations, covenants or agreements contained in this indenture, or in any of the bonds or coupons hereby secured, or implied therefrom; and that any and all personal liability of every name and nature, and any and all rights and claims against every such stockholder, officer or director, whether arising at common law or in equity or created by statute or constitution, are hereby expressly released and waived as a condition of, as a part of the consideration for, the execution of this indenture and the issue of the bonds and interest obligations secured hereby.

ARTICLE SIX.

Requests of bondholders—

Section 1. Any demand, request, or other instrument, required by this indenture to be signed and executed by bondholders, may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such demand, request or other instrument, or of the writing appointing any such agent, and of the ownership by any person of bonds issued under and secured hereby, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the Trustees or of the Company with regard to due action taken by them or it under such instrument, if such proof be made in the following manner:

—may be in separate instruments.

—execution of how proved.

The fact and the date of the execution by any person of any such demand, request, or other instrument or writing may be proved by the certificate of any notary public, or other officer in any jurisdiction who by the laws thereof is authorized to take acknowledgments of deeds, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution. [59]

Proof of ownership of bonds.

The fact of the holding by any bondholder of said bonds, and the amounts and issue numbers of such bonds, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated), if such certifi-

cate shall be deemed by the Trustees to be satisfactory, showing that at the date therein mentioned such person had on deposit with such depositary the bonds described in such certificate. While the proof provided for by this section may be required by the Trustees or by the Company, yet the Trustees shall be protected in accepting and acting without proof upon any demand, request, or other instrument by them believed to be genuine and to have been signed by the proper party or parties.

—Bearer may be treated as absolute owner.

Section 2. The Company and the Trustees may deem and may treat the bearer of any bond hereby secured, and the bearer of any coupons for interest on any such bond, as the absolute owner of such bond or coupon, as the case may be, for the purpose of receiving payment of any bond or coupon, and for all other purposes, and neither the Company nor the Trustees shall be affected by any notice to the contrary.

ARTICLE SEVEN.

Release of equipment from lien of mortgage.

Section 1. Upon the written request of the president or vice-president of the Company, from time to time, while the Company is in possession of any of the property subject to this indenture, but subject to the conditions and limitations in this section prescribed and not otherwise, the Trustees shall release from the lien and operation of this indenture any portion of the equipment, embraced within this indenture, which may have become unfit, unnecessary, or unsuitable for use in the maintenance and operation

of the Company's irrigation works or system, or whenever it shall be deemed desirable by the Company to replace the same with or substitute [60] therefor new equipment or property, of a value at least equal to that of the property so replaced or supplanted; Provided, however, that such disposition, replacement or substitution shall not impair or reduce the efficiency, or interfere with the due operation of the Company's irrigation works or system. Any new property acquired by the Company to take the place of any property released under the provisions of this section shall become and be subject to this indenture as fully as if specifically mortgaged or assigned hereby; but if requested by the Trustees, the Company will convey and assign the same to the Trustees by appropriate deeds or other instruments upon the trusts and for the purposes of this indenture.

Substituted property subject to lien of mortgage.

Section 2. In the event the purchase money mortgage or mortgages, taken by the Company as part payment for any of the lands sold by the Company, after the date of recording this indenture shall exceed the sum or amount of Forty-two (42) Dollars per acre, the lien of the note or notes evidencing the unpaid purchase money, in excess of said sum or amount, shall be secondary and subordinate to the lien of the note or notes evidencing the unpaid purchase money to the amount of not to exceed Forty-two (42) Dollars per acre, as afore-

Purchase money mortgages to amount to $42 per acre shall be a first lien—excess over $42 per acre shall be a second lien.

said; said notes constituting a first lien as aforesaid, and the said notes constituting the second lien as aforesaid, may be secured by the same mortgage, and the said purchase money notes and mortgages securing the same shall be in such form as the Company shall from time to time prescribe; the said notes constituting a first lien as aforesaid may have any maturity or maturities respectively, which the Company shall determine and may mature either prior or subsequent to the said notes constituting a second lien as aforesaid.

Release of real property mortgaged.

Section 3. Upon the written request of the President of the Company, or in event of his death, resignation, absence from the State of Illinois, inability or refusal to act, then upon the written request of the Vice-president of the Company, the [61] Trustees, from time to time, shall execute such releases or other instruments as may be required to release from the lien and operation of this indenture any and all of the lands hereby mortgaged, including a release of the water rights specified in the form of deed then used by the Company, in conveying its lands, and acquired or held by the Company for purposes of sale, and which are not required for the purpose of constructing, maintaining or operating its irrigation works or system, and which the Company shall in good faith sell or contract to sell and desire to have released and conveyed in order to give good title to the purchasers; provided, however, that no such release shall be made unless and until the President, Vice-President or Secretary of the Com-

—condition of release.

pany shall file with the Trustees a written statement under oath, setting forth that the Company has sold or in good faith contracted to sell the tract or tracts of land, a release of which from the lien of this indenture is desired, stating the name or names of the purchaser or purchasers, describing the tract of land purchased, and the price or prices and the terms of payment for such land, and the water rights to be conveyed therewith appurtenant thereto, upon the filing of said request and statement with the Trustees, the Trustees shall execute and deliver to the Company, or upon its order, a release of all and singular the premises described in said statement, including the water rights therein mentioned; within ninety (90) days after the execution and delivery of said release by the Trustees, the Company shall deposit or cause to be deposited, with the Bank, Trustee, a purchase money mortgage or mortgages and notes thereby secured, covering the land so sold and released, constituting a first and prior lien to an amount not less than Forty-two (42) Dollars per acre, upon the land so sold and released, together with a certificate of counsel learned in the law, that such mortgage or mortgages and notes thereby secured, to an amount not less than Forty-two (42) Dollars per acre upon the land so sold and released, constitutes a first **[62]** lien on the land covered thereby; in event that the purchase money mortgage or mortgages taken by the Company as part payment for any of the land so sold and released, shall exceed the sum or amount of Forty-two (42) Dollars per acre, the notes evidencing such unpaid

Deposit of purchase money mortgages for lands so sold and released.

purchase money may be divided into two classes containing the conditions respectively, as provided by Section 2 of this Article and upon the delivery to the said Trustees of the said purchase money mortgage and notes, constituting a first lien on the premises so sold and released, to an amount not less than Forty-two (42) Dollars per acre, the Company may retain the said notes constituting a second lien as provided by section 2 of this Article; provided, however, the Trustees, in case the Company shall make default at any time, in depositing said mortgages and notes as provided by this Section 3, shall not release any other land under the provisions of this Section 3 until such default shall have been removed; and provided further, that at no time shall the lands released as aforesaid, for which purchase money mortgages are not deposited with the Bank, Trustee, as provided by this Section, 3, exceed ten (10) per centum of the total aggregate amount of all lands, to which the Company held good title on the date of recording this indenture and all lands to which the Company acquired good title subsequent to said date, as shown by the certificates of counsel and the sworn statements of the President, Vice-President, or Secretary of the Company as provided in Sections 8 and 10 of Article Three hereof.

Limitation on amount of land authorized to be released.

Section 4. At any time upon the written request of the President of the Company or in event of his death, resignation, absence from the State of Illinois, inability or refusal to act, then upon the written request of the

Release of tract not exceeding 500 acres at any time on request.

Vice-President of the Company the Trustees shall execute and deliver to the Company or upon its order a release of any tract or tracts of land described in such request, subject to the lien of this indenture, including a release of the water rights specified in **[63]** the form of deed then used by the Company in conveying its lands and not exceeding in the aggregate five hundred (500) acres, and which are not required for the purpose of constructing, maintaining or operating its irrigation works or system, provided, however, that there shall be deposited with the Trustees, with such written request for such release, the written undertaking or obligation of the Company executed by its President or Vice-President and attested by its Secretary under the corporate seal of the Company, to deposit or cause to be deposited with the Trustees within ninety (90) days from the execution and delivery of such release, a purchase money mortgage or mortgages and notes thereby secured constituting a first lien upon the premises so released, to an amount not less than Forty-two (42) Dollars per acre, for each acre of land so released and also a certificate of counsel learned in the law that said purchase money mortgages so deposited with the Trustees, constitute a first and valid lien to the extent and amount aforesaid on the premises so released; the Trustees shall not release any other tract of land upon the written request of the President or Vice-President of the Company, accompanied by the said written obligation or undertaking of the Company as afore-

Company's undertaking to deposit mortgages.

No second tract to be released till purchase money mortgages deposited.

said, until the said purchase money mortgages and notes for the land released as aforesaid, shall first have been deposited with the Trustees as hereinbefore provided.

Company may deposit cash in lieu of purchase money mortgages.

At any time the Company shall have the right to deposit with the trustees in lieu of the said purchase money mortgages and notes, or any part thereof, cash to the amount of Forty-two (42) Dollars per acre for each and every acre of land released by the Trustees from the lien of this indenture, for which purchase money mortgages shall not have been deposited as aforesaid; but such cash deposit shall be refunded by the Trustees at any time upon the deposit with the Trustees of said purchase money mortgages to the amount which **[64]** the Company would have been required to deposit, had no cash deposit been made.

The Trustees may accept and rely upon the written requests, statements and documents furnished by the Company or any of its officers as in this Article Seven provided, and the same shall be and constitute full protection and justification to the Trustees for anything suffered or done by them under this Article Seven in acting thereon.

Collection of notes and mortgages pledged hereunder.

The Trustees shall be entitled to collect and receive and sue for any and all sums of money accruing upon said notes, or under the mortgages securing the same, deposited with the Trustees as herein provided and to enforce or realize upon, by suit or otherwise, the lien of said mortgages, or in their discretion may employ either Cobe & McKinnon of the City of Chicago, Illinois, or the

Assets Realization Company of Camden, New Jersey, or such other person or corporation as the Trustees may select, as their agent to collect, receive and sue for said sums, or to enforce or realize upon, as aforesaid, the lien of said mortgages.

Disposition of moneys so collected.

The moneys received by, for and paid over to and deposited with the Bank, Trustee, under the provisions of this section, except moneys deposited in lieu of purchase money mortgages shall be used and applied by them as in the manner provided in Article Two of this indenture.

In no event shall any purhaser or purchasers of any property sold or disposed of under any provision of this Article Seven be required to see the application of the purchase money.

Proceedings to foreclose mortgages pledged.

The Trustees shall be under no obligation to foreclose any of said mortgages unless the Company shall advance the costs and expenses thereof, including Trustees' fees, or unless, on the failure of the Company so to do, one or more of the bondholders shall indemnify the Trustees in a manner and in an amount satisfactory to the Trustees against such costs and expenses. All advances made and expenses incurred by the **[65]** Trustees in and about any such foreclosure sale shall be repaid, with interest, out of the proceeds of such sale.

In case the Trustees shall enforce the collection of any of said notes or mortgages by legal proceedings, as herein provided, and thereby procure a sale of the lands securing said notes, the Trustees may, if they deem best in the interest of the bondholders so to do, bid for and purchase such property at such

sale at a price not exceeding the amount of said notes, plus interest, costs and expenses of the proceedings, and the certificate of purchase so obtained by the Trustees, or title to the lands if such sale results in the Trustees obtaining title thereto, may be sold by the Trustees at such price and on such terms as to the Trustees may seem meet and proper. All moneys advanced by the Trustees for the purchase of lands as hereinbefore provided shall be and constitute a first lien upon the property mortgaged and pledged under this indenture.

Any release authorized by this Article Seven may be executed by the Bank, Trustee, alone and when so executed, shall have the same force and effect as though executed by the Trustees jointly.

Powers of receiver or Trustees in possession.

Section 3. In case any of the property subject to this indenture shall be in possession of a receiver lawfully appointed, the powers in and by this Article Seven conferred upon the Company may be exercised by such receiver, with the approval of the Trustees; and if the Trustees shall be in possession of any such property under any provision of this indenture, then all the powers in this article conferred upon the Company may be exercised by the Trustees in their discretion.

Proceeds of property taken by eminent domain.

Section 4. All moneys received as compensation for any property or rights of the Company taken by the exercise of the power of eminent domain shall be treated as realized from a voluntary sale by the Company of the property or rights so [66] taken, and such moneys shall be subject in all respects to the provisions of this

Article Seven, as though realized from a voluntary sale, except that if the condemnation proceedings are defended by the Company, its reasonable expenses and attorneys' fees in making such defense shall be deducted from any award, and only the surplus paid over to the Trustees as in this Article Seven provided.

ARTICLE EIGHT.

Until default Company to remain in possession.

Section 1. Until some default shall have been made in the due and punctual payment of the interest on or the principal of the bonds at any time outstanding and hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the Company, and, until such default shall have continued beyond the period of grace, if any, herein provided, with respect thereto, the Company, its successors and assigns, shall be suffered and permitted to retain actual possession of all the property subject to this indenture, except the property pledged or required to be pledged with the Trustees hereunder, and to manage, operate and use the same and every part thereof, with the rights and franchises appertaining thereto, and to collect, receive, take, use and enjoy the revenues, income, rents, issues and profits thereof.

Termination of trust.

Section 2. If, as and when the bonds issued under and secured hereby shall have become due and payable, the Company shall well and truly pay, or cause to be paid, the whole amount of the principal and interest due upon all of the bonds

and coupons hereby secured, then outstanding, or shall provide for the payment of such bonds and coupons by depositing with the said Bank, Trustee hereunder, the entire amount due thereon for principal and interest, and also shall pay, or cause to be paid, all other sums payable hereunder by the Company, and shall well and truly keep and perform all the things herein **[67]** required to be kept and performed by it according to the true intent and meaning of this indenture, then and in that case all property, rights and interests hereby conveyed or assigned or pledged shall revert to the Company, and the estate, rights, title and interest of the Trustees, shall thereupon cease, determine and become void; and in such case the Trustees, on demand of the Company and at its cost and expense, shall enter satisfaction of this indenture upon the records; otherwise the same shall be, continue, and remain in full force and virtue.

ARTICLE NINE.

Acceptance by Trustees.

Section 1. The Trustees, for themselves and their successors, hereby accept the trusts and assume the duties herein created and imposed upon them, but upon the following terms and conditions:

Responsibility of Trustees.

(a) The Trustees shall be responsible for reasonable diligence in the performance of their trust and to that extent only, and shall not be answerable for the default, omission, mistake or misconduct of any agent or attorney appointed in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; nor shall

the Trustees be answerable for any default of the said Cobe & McKinnon or the said Assets Realization Company in and about the collections or receipts mentioned in Article Two and in Article Seven of this indenture; nor shall any Trustee be responsible for the acts or defaults of any other trustee or trustees, or for anything whatever in connection with this trust, except each for its or his wilful misconduct or gross negligence.

Protection of Trustees.

(b) The Trustees shall be protected in accepting and acting upon any notice, request, consent, certificate, bond or other paper or document, by them believed to be genuine and to have been signed by the proper party or parties, and any order, request or statement to be made upon or to the Trustee, or either of them, by the Company may be signed by the [68] President, Vice-President or Secretary of the Company, unless otherwise specifically required, and the Trustees may accept as conclusive proof of any fact or matter required to be ascertained by them herein any statement signed by any such officer or otherwise in accordance with the provisions of this indenture.

Personal non-liability of Trustees.

(c) The Trustees shall not be personally liable for any debts duly contracted by them, or for damages to persons or property injured or damaged, or for salaries or non-fulfillment of contracts during any period wherein the Trustees shall manage the trust property or premises upon entry as aforesaid. Neither shall the Trustees be under any obligation to take any action toward the execution or enforcement of the trusts hereby created, which,

in the opinion of the Trustees, shall be likely to involve expenses or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the Trustees, furnish satisfactory indemnity against such expense or liability; nor shall the Trustees be required to take notice of any default hereunder, unless notified in writing of such default by the holders of at least five per cent in amount of the bonds hereby secured then outstanding, or to take action in respect of any default unless requested to take action in respect thereof, by a writing signed by the holders of not less than a majority in amount of the bonds hereby secured, then outstanding, and tendered satisfactory indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but the foregoing provisions of this section are intended only for the protection of the Trustees, and shall not be construed to affect any discretion or power by any provision of this indenture given to the Trustees, to determine whether or not they shall take action in respect of any default without such notice or request from bondholders, or to affect any other decision or power given to the Trustees. **[69]**

Conditions precedent to action by Trustees.

(d) The Trustees shall not be responsible for the recording or filing of this indenture as a mortgage of real or personal property, or for the recording or filing of any mortgage deposited with them hereunder; nor shall the Trustees be required to take any action required by statute or any contract or otherwise for preserving the title to the property hereby conveyed

Trustees not responsible for filing or recording this indenture or any mortgage deposited hereunder.

or for effectuating, protecting, perpetuating, or keeping good the lien of this indenture or of said mortgages, or to give notice of the existence of such lien or of the assignment or deposit of any such mortgage; nor shall said Trustees be liable or responsible for permitting or suffering the Company, its agents or servants, to retain or be in the possession of, or manage, conduct or control the canals, premises and property hereby conveyed, or intended so to be, nor shall said Trustees become responsible for any destruction, deterioration, loss, injury or damage which may be done or suffered to be done to said canals, property and premises by the Company, its servants or agents or by any person or persons whomsoever, nor shall the Trustees be held responsible for the consequences of any breach by the Company, its agents or servants, of any of the covenants herein, or in said bonds contained, or in any contract previously entered into by it, nor for or on account of any act, omission or default of the Company, its agents, or servants, of any kind, character or nature whatsoever.

Reimbursement of Trustees.

(e) The Trustees shall be reimbursed for, and be indemnified against any liability or damages which may be sustained by them in the premises.

Prior lien of Trustees.

(f) The Trustees shall have, secured hereby upon the property covered by this indenture and the proceeds thereof, a lien prior to that of any bonds issued under this indenture, for their compensation, disbursements and expenses, including attorneys' and counsels' fees, and also for

any liability or damage by them sustained in the premises. [70]

No responsibility of Trustees for validity of mortgage or recitals therein.

(g) The Trustees shall not be responsible in any manner whatsoever for the validity of this indenture, or of the lien hereby created, or for the execution and acknowledgment thereof, or for the value, genuineness or validity of the mortgages or notes deposited hereunder, or for the title, value, amount or extent of the security afforded by the property covered or purported to be covered hereby, or for the recitals herein or in said bonds contained, all such recitals being and to be taken as the statements of the Company, and as not made by the Trustees who have no knowledge in reference thereto; nor shall they be accountable for the use of any bonds certified and delivered by the Trustees hereunder or for the application of the proceeds of such bonds.

No duty of Trustees as to Taxes, etc.

(h) It shall be no part of the duties of the Trustees to pay any taxes or assessments on any of the property covered, or intended to be covered, by the lien hereof or on any of the property covered by the lien of the mortgages or notes deposited by the Company with the Trustees under the provisions hereof; or to keep themselves informed or advised as to the payment of any such taxes or assessments, or to give notice of any default on the part of the Company in that regard or to require the payment of such taxes or assessments; but the Trustees may, in their discretion, pay such taxes or assessments if payment of the same has been neglected by the Company or the mortgagors, subject, however, to the right of the

Company, or mortgagors to contest the same as mentioned in Section 4 of Article Three of this indenture.

Duty of Trustees when sued.

(i) Should any suit or other proceeding be brought against the Trustees by reason of any matter or thing connected with the trusts hereby created, or by reason of their being such Trustees, they shall be under no obligation to enter any appearance or in any way to appear or defend such suits or other proceedings until indemnified to their full satisfaction for so doing; but they may, nevertheless, appear and defend [71] such suits or proceedings without indemnity, if they elect so to do, and in such case they shall be reimbursed by the Company, or in default be compensated therefor from the trust estate.

Compensation of Trustees.

The Trustees may select and employ in and about the execution of the trusts hereby created suitable agents and attorneys and shall be entitled to reasonable compensation for all services rendered by themselves and by such agents and attorneys in the execution of the trusts hereby created, and the Company agrees to pay such compensation as well as all expenses necessarily incurred or advances made by the Trustees hereunder.

Resignation of Trustees.

Section 2. Either of the Trustees, or any trustee or trustees hereafter appointed, may resign and be discharged from the trusts created by this indenture, by executing and filing with the Company an instrument in writing resigning such trusts, and by giving the bondholders notice by publication of such resignation, specifying a date when such res-

ignation shall take effect, which notice shall be published at least once a week for four successive calendar weeks prior to the date so specified, in a newspaper at that time published in the City of Chicago, in the State of Illinois. Such resignation shall take effect on the date specified in such notice, unless previously a successor trustee or successor trustees shall have been appointed as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of such successor trustee or trustees.

Removal of Trustees.

Any trustee or trustees hereunder may be removed at any time by an instrument in writing under the hands of the holders of a majority in amount of the bonds hereby secured and then outstanding and delivered to the Trustees and the Company.

Section 3. Emile K. Boisot, one of the parties of the second part, has been joined as Trustee hereunder, so that if by any [72] present or future law in any jurisdiction, in which it may be necessary to perform any act in the execution of the trusts herein created,

Corporate trustee may act for both Trustees.

the First Trust and Savings Bank, Trustee, or its successor or successors, may be incompetent or unqualified to act as such Trustee, then all of the acts required to be performed in such jurisdiction in the execution of the trusts hereby created, shall and will be performed by said Emile K. Boisot, as Trustee, or his successor or successors, acting alone. Except as it may be deemed necessary for said Emile K. Boisot solely to execute the trusts hereby created, the First Trust and Savings Bank,

Trustee, or its successor or successors, may solely have and exercise the powers, and shall be solely charged with the performance of the duties hereinbefore declared on the part of the Trustees to be had and exercised, or to be performed. Any request in writing by the First Trust and Savings Bank, Trustee, or by any Trust Company appointed in succession to it, to the individual Trustee hereunder, or any Trustee appointed in succession to him, shall be sufficient warranty for the individual Trustee, or his successor, taking such action as may be so requested. Such individual Trustee, or any successor, may delegate to the First Trust and Savings Bank, or the Trust Company appointed in succession to it, the exercise of any power, discretionary or otherwise, conferred by any provisions of this indenture; it being the true intent and purpose of the parties hereto that at all times there shall be a duly appointed, qualified and acting Trustee vested with the powers, rights, estates and interests, and charged with the administration and execution of the trusts and duties by this instrument granted, created and imposed.

Appointment of successor Trustees.

Section 4. In case at any time the Trustees, or either of them, or any successor trustee, shall resign or shall be removed or otherwise shall become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding, [73] by an instrument or concurrent instruments signed by such bondholders or their attorneys-in-fact duly authorized but until a new trustee or trustees shall be appointed by the bondhold-

ers as herein authorized, the Company, by an instrument executed by order of its board of directors, may appoint a trustee or trustees to fill such vacancy; provided, however, that every such trustee or one of such trustees shall be a trust company in the said City of Chicago having a capital and surplus aggregating at least $1,000,000, if there be such a trust company willing and qualified to accept the trust upon reasonable or customary terms. After any such appointment by the Company, it shall publish notice of such appointment once in each of four successive calendar weeks in a newspaper published in the City of Chicago, Illinois, and any new trustee or trustees so appointed by the Company shall immediately and without further act be superseded by a new trustee or trustees appointed in the manner above provided by the holders of a majority in amount of the bonds hereby secured, if such appointment by such bondholders be made prior to the expiration of six months after such publication of notice; provided, however, that the appointment of a successor to the individual Trustee, shall be subject to the approval of the Bank, Trustee, or its successor.

Appointment of Trustees by Company.

Upon the appointment of any new trustee hereunder, it shall be the duty of the Company to execute a certificate of such appointment under its corporate seal and to cause the same to be recorded in the same manner as this indenture shall have been recorded.

Recording certificate of appointment of new Trustee.

Any successor trustee appointed hereunder shall

execute, acknowledge and deliver to the trustee last in office and also to the Company, an instrument accepting such appointment hereunder, and thereupon such successor trustee, without any further act, deed or conveyance shall become vested with all the estates, properties, powers, rights, trusts, duties and obligations of its predecessor in the trust hereunder, with like [74] effect as if originally named as trustee herein, but nevertheless, on the written request of the Company or of the successor trustee, the trustee ceasing to act shall execute and deliver an instrument transferring to such successor trustee, upon the trusts herein expressed, all the estates, properties, rights, powers and trusts of the trustee so ceasing to act, and shall duly assign, transfer, and deliver its interest in any property and moneys subject to this indenture, to the successor trustee so appointed in its place; and, upon request of any such successor trustee, the Company shall make, execute, acknowledge and deliver any and all deeds, conveyances or other instruments in writing for more fully and certainly vesting in and confirming to such successor trustees all such estates, properties, rights, powers and duties.

Acceptance by new Trustee.

Conveyance by predecessor Trustee.

ARTICLE TEN.

Section 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the Company, shall bind its successors and assigns, whether so expressed or not.

Covenants, etc., of Company binding on its successors.

Section 2. Nothing contained in this indenture or in any bond hereby secured, shall

Consolidation.

prevent any lawful consolidation or merger of the Company with any other corporation, or any conveyance and transfer (subject to the continuing lien of this indenture and to all the provisions thereof), of all the property subject to this indenture as an entirety to a corporation at that time existing, and empowered to acquire the same; provided, however, that such consolidation, merger or sale shall preserve and not impair the lien and security of this indenture, or any of the rights and powers of the Trustees or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the bonds hereby secured, according to their tenor, and the due and punctual performance [75] and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

Status of consolidated Company.

Section 3. In case, pursuant to Section 2 of this Article, the Company shall be consolidated or merged with any other corporation, or shall sell, convey and transfer (subject to this indenture), all the property covered by this indenture, as an entirety as aforesaid, the successor corporation formed by such consolidation, or into which the Company shall have been merged, or which shall have purchased and received a conveyance and transfer, as aforesaid—upon executing and causing to be recorded an instrument satisfactory to the Trustees, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of the bonds hereby secured, and the performance

of all the covenants and conditions of this indenture—shall succeed to, and shall be substituted for, the Company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part; and such successor corporation thereupon may cause to be signed and may issue, either in its own name or in the name of the Company, any or all of such bonds, issuable hereunder which theretofore shall not have been executed by the company and delivered to the said Bank, Trustee; and upon the order of said successor corporation, in lieu of the Company, and subject to all the terms, conditions and restrictions herein prescribed, the said Bank, Trustee, shall certify and shall deliver any of such bonds which previously shall have been signed and delivered by the officers of the Company to said Trustee for certification, and any of such bonds which such successor corporation thereafter shall cause to be signed and delivered to said Trustee for that purpose. All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this [76] indenture, as if all of said bonds had been issued at the date of the execution hereof.

Meaning of terms "Company" and "Bitter Root Valley Irrigation Company."

Section 4. For every purpose of this indenture, including the execution, issue and use of any and all bonds hereby secured, the terms "Company" and the "Bitter Root Valley Irrigation Company" include and mean not only the party of the first part hereto, but also any such successor corporation formed by consolidation or otherwise under the laws of the State of

Montana or elsewhere. Every such successor or purchasing corporation shall possess, and from time to time may exercise, each and every right and power hereunder of the Bitter Root Valley Irrigation Company in its name or otherwise.

Rights and duties of officers of successor Company.

Section 5. Any act or proceeding, by any provision of this indenture authorized or required to be done or performed by any board or officer of the Company shall and may be done and performed with like force and effect by the like board or officer of any corporation that shall at the time be such lawful sole successor or purchaser of the Company.

Surrender of powers by Company.

Section 6. Nevertheless, before the exercise of the powers conferred by this Article, the Company, by instrument in writing executed by authority of two-thirds of its Board of Directors and delivered to the Trustees, may surrender any of the powers reserved to the Company or to such successor corporation; and thereupon such power so surrendered shall terminate.

Meaning of word "Trustees."

Section 7. The word Trustees means the Trustees or Trustee for the time being, whether original or successor; the words Trustee, bond, bondholder, mortgage, note, shall include the plural as well as the singular number, unless otherwise expressly indicated. The word coupons refers to the interest coupons attached to the bonds issued hereunder. The word person, used with reference to a bondholder, shall include associations or corporations owning any of said bonds. [77]

Testimonium. In Witness Whereof, The said Bitter Root Valley Irrigation Company has caused this indenture to be signed and acknowledged in its corporate name, by its president or vice-president, and its corporate seal to be hereunto affixed, and the same to be attested by its secretary; and the said the First Trust and Savings Bank, to evidence its acceptance of the trusts hereby declared and created, has caused this indenture to be signed and acknowledged in its corporate name by its president or vice-president, and its corporate seal to be hereunto affixed, and the same to be attested by its secretary, and the said Emile K. Boisot, to evidence his acceptance of the trusts hereby created, has hereunto set his hand and seal—all as of the day and year first above written.

Execution by Bitter Root Valley Irrigation Company. This instrument is executed in triplicate originals.

BITTER ROOT VALLEY IRRIGATION COMPANY,
By FRANK I. BENNETT,
President.

[Corporate Seal of the Bitter Root Valley Irrigation Company.]

Attest:

FRANK G. MURRAY,
Secretary.

Signed, sealed and delivered in presence of:

LEONARD A. BUSBY.
S. J. BLUMENTHAL.

As to Bitter Root Valley Irrigation Company.

FIRST TRUST AND SAVINGS BANK,
By EMILE K. BOISOT,
Vice-President.

[Corporate Seal of the First Trust and Savings Bank.]

Attest:

Execution by the First Trust & Savings Bank.

DAVID V. WEBSTER,
Secretary.

Signed, sealed and delivered in the presence of:

O. A. BESTEL.
ROY C. OSGOOD.

As to the First Trust and Savings Bank.

EMILE K. BOISOT. (Seal)

Execution by Emile K. Boisot.

Signed, sealed and delivered in the presence of:

O. A. BESTEL.
ROY C. OSGOOD.

As to Emile K. Boisot. [79]

State of Illinois,
County of Cook,—ss.

Acknowledgment of Company.

I, Carrie Perrine, a notary public in and for the County of Cook and State of Illinois, do hereby certify that Frank I. Bennett, president, and Frank G. Murray, secretary, of the Bitter Root Valley Irrigation Company, a corporation, the party of the first part to the foregoing instrument, both personally known to me to be the president and secretary, respectively, of the said Bitter Root Valley Irrigation Company, and personally known to me to be the same persons whose names are subscribed

to the foregoing instrument as such president and secretary, respectively, appeared before me this day in person and acknowledged that said corporation executed the said instrument, and that they signed, sealed and delivered the said instrument as their free and voluntary act as such president and secretary, respectively, and as the free and voluntary act of the said Bitter Root Valley Irrigation Company, for the uses and purposes therein set forth.

And the said Frank G. Murray, being by me first duly sworn, deposes and says that he is the duly qualified and acting secretary of the said Bitter Root Valley Irrigation Company, and that the seal affixed to the said instrument is the corporate seal of the said Bitter Root Valley Irrigation Company, and was by the president affixed to the said instrument in pursuance of the power and authority granted him by the by-laws and by the order of the Board of Directors of said Company.

Given under my hand and notarial seal, this 29th day of June, A. D. 1909.

[Notarial Seal.] CARRIE PERRINE,
Notary Public.

My commission expires February 7, 1910. [80]

State of Illinois,
County of Cook,—ss.

Acknowledgment of the First Trust & Savings Bank.

I, Oliver A. Bestel, a notary public in and for the County of Cook and State of Illinois, do hereby certify that Emile K. Boisot, vice-president, and David V. Webster, secretary of the First Trust and Savings Bank, a corporation, party of the second part in and to the foregoing instrument,

and personally known to me to be the vice-president and secretary, respectively, of said the First Trust and Savings Bank, both personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, appeared before me this day in person and acknowledged that said corporation executed the said instrument, and that they signed, sealed and delivered the said instrument as their free and voluntary act as such president and secretary, respectively, and as the free and voluntary act and deed of the said the First Trust and Savings Bank for the uses and purposes therein set forth.

And the said David V. Webster, being by me first duly sworn, deposes and says that he is the duly qualified and acting secretary of said the First Trust and Savings Bank, and that the seal affixed to the said instrument is the corporate seal of said corporation and was by him affixed to the said instrument, in pursuance of the power and authority granted him by the by-laws of said corporation.

Given under my hand and notarial seal, this 29th day of June, A. D. 1909.

[Notarial Seal.] OLIVER A. BESTEL,
Notary Public.

My commission expires January 2d, 1910. [81]

State of Illinois,
County of Cook,—ss.

Acknowledgment of Emile K. Boisot.

I, Oliver A. Bestel, a notary public in and for the County of Cook and State of Illinois, do hereby certify that Emile K. Boisot, personally known to me to be the same person whose

name is signed to the foregoing instrument, appeared before me this day in person and acknowledged to me that he executed the same and that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 29th day of June, A. D. 1909.

[Notarial Seal.] OLIVER A. BESTEL,
Notary Public.

My commission expires January 2d, 1910. [82]

State of Illinois,
County of Cook,—ss.

Affidavit of president and secretary of Company under Montana statute.

Before me, the undersigned authority, personally appeared Frank I. Bennett, president, and Frank G. Murray, secretary, who, being duly and severally sworn, depose and say that they are, respectively, the president and secretary of the Bitter Root Valley Irrigation Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, the party of the first part in the foregoing mortgage or deed of trust; that as such officers they executed the said instrument for and on behalf of the said corporation, that said mortgage or deed of trust was made and executed by the said corporation in good faith and for the purpose of securing the payment of the bonds mentioned in said mortgage or deed of trust to the amount therein set forth, and the interest thereon; and that said mortgage or deed of trust was made and executed without any

design, desire or intent to hinder, delay, or defraud the creditors of said corporation.

FRANK I. BENNETT,
President.

FRANK G. MURRAY,
Secretary.

Sworn and subscribed to before me this 29th day of June, A. D. 1909.

[Notarial Seal] CARRIE PERRINE,
Notary Public.

My commission expires February 7th, 1910. **[83]**

State of Illinois,
County of Cook,—ss.

Affidavit of president and secretary of corporate trustee under Montana statute.

Before me, the undersigned authority, personally appeared Emile K. Boisot, Vice-President, and David V. Webster, Secretary, who being duly and severally sworn depose and say that they are, respectively, the Vice-President and Secretary of the First Trust and Savings Bank, a corporation organized and existing under and by virtue of the laws of the State of Illinois, one of the Trustees, party of the second part, mentioned in the foregoing mortgage or deed of trust; that as such officers they executed the said instrument for and on behalf of the said First Trust and Savings Bank, that said mortgage or deed of trust was made and executed by the said First Trust and Savings Bank in good faith and for the purpose of securing the payment of the bonds mentioned in said mortgage or deed of trust to the amount therein set forth and the interest thereon; and that said

mortgage or deed of trust was made and executed by said Bank without any design, desire or intent to hinder, delay or defraud the creditors of the said Bitter Root Valley Irrigation Company.

EMILE K. BOISOT,
Vice-President.
DAVID V. WEBSTER,
Secretary.

Sworn and subscribed to before me this 29th day of June, A. D. 1909.

[Notarial Seal] OLIVER A BESTEL,
Notary Public.

My commission expires January 2d, 1910. **[84]**

State of Illinois,
County of Cook,—ss.

Affidavit of individual Trustee under Montana statute.

Before me, the undersigned authority, personally appeared Emile K. Boisot, who being duly sworn deposes and says that he is one of the Trustees, party of the second part, mentioned in the foregoing mortgage or deed of trust; that said mortgage or deed of trust was made and executed by him in good faith and for the purpose of securing the payment of the bonds mentioned in said mortgage or deed of trust to the amount therein set forth and the interest thereon; and that said mortgage or deed of trust was made and executed by him without any design, desire or intent to hinder, delay or defraud the creditors of the said Bitter Root Valley Irrigation Company.

EMILE K. BOISOT.

Sworn and subscribed to before me this 29th day of June, A. D. 1909.

[Notarial Seal] OLIVER A BESTEL,
Notary Public.

My commission expires January 2d, 1910. [85]

All of the property so conveyed and mortgaged to your orators as aforesaid (except certain land contracts, purchase money mortgages, and notes therein mentioned, or thereafter acquired, deposited with your orators, as trustees, or in the hands of officers of said company, or of the trustee in bankruptcy, hereinafter mentioned) is situated within the County of Ravalli, and State of Montana, and within the District of Montana. Said mortgage or deed of trust was duly filed for record in the office of the Recorder of Ravalli County, Montana, on July 2, 1909, recorded in Volume 23 of Mortgages, at page 394 *et seq.*

Your orators duly accepted the trusts therein created and they were then and now are fully authorized and empowered to take and hold in trust the property conveyed to them therein and to execute the trusts reposed in them under and by virtue of the provisions thereof; and in the event that your orator, First Trust and Savings Bank, is, for any reason incompetent and so unqualified to act as such trustee, your orator, Emile K. Boisot, was then and is now fully authorized and empowered to take and hold in trust the property conveyed to him therein, and to execute the trusts reposed in your orators, as trustees, or in your orator, Emile K. Boisot, under and by virtue of the provisions thereof.

On or about July 8, 1909, the Bitter Root Valley Irrigation Company duly issued of the bonds described in said mortgage or deed of trust, bonds numbered from 1 to 100, inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1914; and on or about July 8, 1909, duly issued bonds numbered from 101 to 200 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1915; and on or about August 21, 1909, duly issued bonds numbered from 201 to 314 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1916; and on or about December 27, 1909, duly issued bonds numbered from 315 to 350 inclusive, in the sum of one thousand dollars ($1,000.00) **[86]** each, maturing January 1, 1916; and on or about November 11, 1909, duly issued bonds numbered from 351 to 374 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1917; and on or about December 27, 1909, duly issued bonds numbered from 375 to 427 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1917; and on or about April 19, 1910, duly issued bonds numbered from 428 to 437 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1917; and on or about May 23, 1910, duly issued bonds numbered from 438 to 453 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1917; and on or about February 6, 1911, duly issued bonds numbered from 454 to 479 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1917; and on or about

November 11, 1909, duly issued bonds numbered from 501 to 540 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1918; and on or about December 27 1909, duly issued bonds numbered from 541 to 586 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1918; and on or about April 19, 1910, duly issued bonds numbered from 587 to 596 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1918; and on or about September 27, 1912, duly issued bonds numbered from 597 to 647 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1918; and on or about July 8, 1909, duly issued bonds numbered from 751 to 1180 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1919; and on or about November 11, 1909, duly issued bonds numbered from 1181 to 1250 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1919; and on or about December 27, 1909, duly issued bonds numbered from 1251 to 1296 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1919; and on or about April 19, 1910, duly issued bonds numbered from [87] 1297 to 1300 inclusive, in the sum of one thousand dollars ($1,000.00) each, maturing January 1, 1919; and on or about November 11, 1909, duly issued bonds numbered from 1301 to 1400 inclusive, in the sum of five hundred dollars ($500.00) each, maturing January 1, 1919; and on or about December 27, 1909, duly issued bonds numbered from 1401 to 1501 inclusive, in the sum of five hundred dollars ($500.00)

each, maturing January 1, 1919; and on or about April 19, 1910, duly issued bonds numbered from 1502 to 1521 inclusive, in the sum of five hundred dollars ($500.00) each, maturing January 1, 1919; and on or about May 23, 1910, duly issued a bond numbered 1522 in the sum of five hundred dollars ($500.00), maturing January 1, 1919; and on or about September 27, 1912, duly issued bonds numbered from 1523 to 1700 inclusive, in the sum of five hundred dollars ($500.00) each, maturing January 1, 1919, and delivered all of the said bonds to your orator, First Trust and Savings Bank, and said bonds of the aggregate par value of one million three hundred seventy-six thousand dollars ($1,376,000.00) were duly certified by your orator, First Trust and Savings Bank, in all respects as provided in said mortgage or deed of trust, and the bonds so certified by your orator, First Trust and Savings Bank, were the bonds bearing dates and numbers and being in the amounts and bearing dates of maturity as aforesaid, and all of said bonds of the aggregate par value of one million three hundred seventy-six thousand dollars ($1,376,000.00), together with the interest coupons thereto attached, were, as your orators are informed and believe, duly sold and delivered by the Bitter Root Valley Irrigation Company for a valuable consideration and in accordance with the provisions of said mortgage or deed of trust, and the said bonds of the aggregate par value of one million three hundred seventy-six thousand dollars ($1,376,000.00), together with all interest coupons thereto attached (except bonds numbered from 1 to

200 inclusive, and 751 to 950 inclusive, which were of the aggregate par value of [88] four hundred thousand dollars ($400,000.00), and which became due and payable on January 1, 1915, or prior thereto, and except the interest coupons upon all of said bonds which became due and payable on January 1, 1916, or prior thereto, which said bonds and interest coupons last mentioned have been paid, surrendered and canceled), are now outstanding in the hands of divers persons and corporations, who are now the owners and holders thereof for value, and your orators are advised and aver that said bonds and coupons so issued as aforesaid are now in all respects valid and outstanding obligations of the defendant, Bitter Root Valley Irrigation Company, and are entitled to the benefits and security of said mortgage or deed of trust, and there is now due and owing thereon the principal sum of nine hundred and seventy-six thousand ($976,000.00) dollars and interest thereon at the rate of six percentum (6%) per annum from January 1, 1916.

VI.

On June 1, 1909, the date of said mortgage or deed of trust, the Bitter Root Valley Irrigation Company owned certain lands and real estate not specifically described in said mortgage or deed of trust, which are subject to the lien thereof, under and by virtue of the terms of said mortgage or deed of trust, said lands last mentioned being the lands and real estate situated in the County of Ravalli, and State of Montana, and described as follows, to wit: [Here follows description of property.] [89]

VII.

Subsequent to the execution, delivery and recordation of said mortgage or deed of trust the Bitter Root Valley Irrigation Company acquired certain additional lands not specifically described in said mortgage or deed of trust which are under the terms and provisions of said mortgage or deed of trust, subject to the lien thereof, said lands last mentioned being the lands situated in the County of Ravalli, and State of Montana, described as follows, to wit: [Here follows description of property.] **[90]**

VIII.

Various portions of the lands in said mortgage or deed of trust or hereinbefore or hereinafter described, prior to or since the date of the execution, delivery and recordation of said mortgage or deed of trust, have been subdivided and in some cases resubdivided. The names of said subdivisions or resubdivisions and the location and description thereof being as follows, to wit:

HAMILTON HEIGHTS.

The following described tract of land, to wit: [Here follows description of property.] **[92]**

IX.

In addition to the lands in said mortgage or deed of trust hereinabove mentioned and described, the Bitter Root Valley Irrigation Company is the owner of lands hereinafter described, which lands are subject to the lien of said mortgage or deed of trust, under and by virtue of the terms and provisions thereof, which lands are situated in the County of

Ravalli, and State of Montana, and are known and described as follows, to wit: [Here follows description of property.] **[95]**

X.

That of the lands in said mortgage or deed of trust hereinbefore or hereinafter described certain portions thereof have been released from the lien of said mortgage or deed of trust by releases duly executed and delivered by your orators, as Trustees, pursuant to and in accordance with the terms and provisions of said mortgage or deed of trust, and the said lands which have been so released as aforesaid are the lands situated in the County of Ravalli, and State of Montana, and known and described as follows, to wit: [Here follows description of property.] **[97]**

XI.

The following described lands are now owned by the Bitter Root Valley Irrigation Company, and have not been released from the lien of said mortgage or deed of trust, and are now subject to the lien of said mortgage or deed of trust, under the terms, covenants, and provisions thereof, and to the rights and lien of your orators under and by virtue of said mortgage or deed of trust: [Here follows description of property.] **[99]**

And your orators have and claim a lien under and by virtue of the terms, covenants and provisions of said mortgage or deed of trust upon all of the said lands, irrigation system and water rights aforesaid, together with all the buildings and improvements thereon, and the rents, income, issues and profits

thereof, and all the privileges and appurtenances thereunto belonging or in anywise appertaining. [101]

XII.

In addition to the land and property in said mortgage or deed of trust or hereinbefore specifically described the Bitter Root Valley Irrigation Company is the owner of other lands and property, which is subject to the lien of your orators under and by virtue of the said mortgage or deed of trust, and the terms and provisions thereof, which are owned by the Bitter Root Valley Irrigation Company at the date of said mortgage or deed of trust, or which have been acquired by said Company since the execution thereof, the description of which lands and property is unknown to your orators, and your orators pray that said Bitter Root Valley Irrigation Company may be required to make discovery of the same in this proceeding, and your orators pray further that they may have leave when the description of such lands and property is so discovered to include the same by way of amendment to this, your orators' bill of complaint, by proper description and to the same effect as though the same were specifically described herein.

XIII.

The Bitter Root Valley Irrigation Company is also the owner of the following described purchase money mortgages upon real estate situated in the County of Ravalli in the State of Montana, which said purchase money mortgages and the notes secured thereby were duly executed and acknowledged

by the makers thereof, and filed for record and recorded in the office of the Recorder of Ravalli County, in said State of Montana, the names of the makers of said mortgages, the dates thereof, the dates of recording thereof, and the document numbers and books and pages in which the same are recorded as aforesaid, and the amounts secured thereby, and the lands described therein are respectively as follows: [Here follows description of property.] [102]

all of which purchase money mortgages and the notes secured thereby are subject to the lien of your orators under and by virtue of the terms and provisions of said mortgage or deed of trust.

XIV.

Your orators show that on January 1, 1916, default was made in the payment of bonds numbered from two hundred and one (201) to three hundred and fifty (350), inclusive, of the bonds of the Bitter Root Valley Irrigation Company, hereinabove described, then issued and outstanding as aforesaid, for the aggregate principal sum of One Hundred and Fifty Thousand Dollars ($150,000.00), and which became due and payable on said first day of January, 1916.

Your orators further show that on the date last mentioned, to wit, January 1, 1916, no funds were provided by said Bitter Root Valley Irrigation Company, or by any other person on its behalf for the payment of said principal sum of One Hundred and Fifty Thousand Dollars ($150,000.00), then due and payable upon the bonds maturing upon said

date as aforesaid, and that on said date demands were made for the payment of some of said bonds so due, but payment thereof was refused, and your orators aver that said default in the payment of said principal sum of One Hundred and Fifty Thousand Dollars ($150,000.00), so due upon said bonds which became due and payable on the first day of January, 1916, has continued from thence hitherto.

Your orators further show that the Bitter Root Valley Irrigation Company has made default in other respects in the performance of the terms, covenants and conditions in said mortgage or deed of trust of June 1, 1909, contained.

Your orators further show that on account of the default so made in the payment of said principal sum of One Hundred and Fifty Thousand Dollars ($150,000.00) which became due as aforesaid upon said bonds on the 1st day of January [103] 1916, there was, on to-wit, the 30th day of March, 1916, delivered to your orators a written request, signed by the holders of a majority in amount of the bonds secured by said mortgage or deed of trust and then outstanding, requesting your orators to declare the principal of all of the said bonds secured by said mortgage or deed of trust then outstanding to be due and payable immediately in accordance with the terms and provisions of said mortgage or deed of trust; and thereupon, on said date last mentioned, your orators, and each of them did, in compliance with said request and in conformity with the duty imposed upon your orators by the terms and provisions of said mortgage or deed of trust, declare

all of the bonds aforesaid, secured by said mortgage or deed of trust, then outstanding, to be immediately due and payable, and do furthermore by this, their bill of complaint, declare the principal of all of the said bonds to be, and the same now is, due and payable. And your orators further aver that there is now due and owing upon said bonds the entire said principal sum of Nine Hundred and Seventy-six Thousand Dollars ($976,000.00), together with interest thereon at the rate of six per centum per annum from January 1, 1916, in accordance with the tenor and effect of said bonds and the terms and provisions of said mortgage or deed of trust, and that your orators are entitled to a foreclosure of the lien of said mortgage or deed of trust upon all of the property subject to the lien thereof as hereinabove set forth and to file this, their bill of complaint, for that purpose.

XV.

Your orators further show that no proceedings at law or suits in equity have been begun or commenced by your orators, or, as your orators are informed and believe, by any holder of any of the bonds secured by said mortgage or deed [104] of trust dated June 1, 1909, or of any of the coupons thereto attached, to enforce the payment of the sum so covenanted to be paid by the Bitter Root Valley Irrigation Company, defendant herein, under the terms of the said bonds and the said mortgage or deed of trust.

XVI.

Your orators further show that on or about the 3d

day of January, 1916, the defendant, Bitter Root Valley Irrigation Company, filed its voluntary petition in this honorable court praying that it might be adjudicated by the court to be a bankrupt within the purview of the acts of Congress relating to bankruptcy, and thereafter such proceedings were had in said court upon said petition that said Bitter Root Valley Irrigation Company was adjudicated bankrupt, as in said petition prayed, and on or about the 23d day of February, 1916, the defendant, F. C. Webster, was appointed trustee in bankruptcy for said Bitter Root Valley Irrigation Company and has duly qualified as such and is now so acting, and the said F. C. Webster, trustee in bankruptcy as aforesaid, is, as your orators are informed and believe, in possession of the said mortgaged property hereinabove mentioned; and your orators further show that upon application by your orators leave has been granted to your orators by this Honorable Court to include as defendant herein, the said F. C. Webster, as trustee in bankruptcy of the Bitter Root Valley Irrigation Company.

XVII.

Your orators further show that Hans B. Knudsen, Caroline Knudsen, Helen E. Carter, Max Bennett, Henry Bennett, Joseph Zitka and W. G. Parks, and the said F. C. Webster, Trustee in bankruptcy of Bitter Root Valley Irrigation Company, [105] who are hereby made parties defendant to this, your orators' bill of complaint, have or claim some interest in said mortgaged property, or some part or portion thereof, as purchasers, lien claimants,

or otherwise, the exact nature of the interest claimed by said defendants being unknown to your orators, but your orators aver that such interest of said defendants, or any or either of them, if any they have, is subject and inferior to the rights and lien of your orators upon said mortgaged property under and by virtue of the terms and provisions of the said mortgage or deed of trust.

XVIII.

And your orators further aver that upon approximately three thousand acres of the property described in said mortgage or deed of trust of June 1, 1909, and subject to the lien thereof, there have been planted by the Bitter Root Valley Irrigation Company orchards of apples and cherries; that the said orchards have been under cultivation from four to five years, by the Bitter Root Irrigation Company which Company has already expended in their planting and cultivation more than three hundred thousand dollars; that the trees have just reached or are approaching bearing; that if said orchards are not taken care of and irrigated during this season, the trees will die and the expenditures of the Bitter Root Valley Irrigation Company upon said orchards will be lost, and thereby the security for the payment of the indebtedness due your orators will be greatly and irreparably depreciated; that it will require at least thirty thousand dollars ($30,000) to take care of and irrigate said orchards during the season of 1916, and that the preparatory work upon said orchards should commence at once.

And your orators further aver that a portion of

the business of the Bitter Root Valley Irrigation Company is the operation [106] and maintenance of an irrigation system and the delivery of water to settlers in the Bitter Root Valley; that the contracts for the sale of land and the purchase money mortgages for the purchase of lands of the Bitter Root Valley Irrigation Company contain the covenant that the Bitter Root Valley Irrigation Company will deliver water through its irrigation system to the settlers; that the failure to deliver water as required by said contract of sale, and purchase money mortgages would greatly and irreparably damage the property of the settlers and the value of the security for the indebtedness due your orators under these contracts of sale and purchase money mortgages.

And your orators further aver that the immediate and continued operation and maintenance of the irrigation system of the Bitter Root Valley Irrigation Company and the prompt delivery of water to the settlers in the Bitter Root Valley is a matter of great public necessity; that the failure of said irrigation system will bring irreparable loss and injury, not only to the property so mortgaged to your orators, but to the property of many other innocent people, settlers in the Bitter Root Valley, and dependent upon said irrigation system for a supply of water and the very existence of their farms and orchards; and that the failure of said irrigation system or delay in delivering water when required would be a great disaster to the inhabitants and settlers of Ravalli County and to the State of Montana.

And your orators further aver that the value of all of the property, including the irrigation system, subject to the lien of said mortgage or deed of trust of June 1, 1909, is far less than the face amount of the bonds due and unpaid secured by said mortgage or deed of trust; that excepting certain personal property of little or no value, and the property subject to the prior lien of the mortgage of June 1, 1909, there is no property or assets of the Bitter Root Valley Irrigation Company in the hands of F. C. Webster as Trustee in bankruptcy; [**107**] that F. C. Webster as Trustee in bankruptcy has therefore no interest in putting said irrigation system in condition to deliver water or in operating and maintaining the same, or in taking care of and irrigating the orchards of the Bitter Root Valley Irrigation Company, and that said F. C. Webster, as Trustee in Bankruptcy as aforesaid, is without funds or means to place said irrigation system in condition to deliver water in the spring of 1916 or thereafter to maintain and operate the same; and that the said F. C. Webster, as Trustee in Bankruptcy is entirely without credit to borrow money for purposes of putting said irrigation system in condition to deliver water or to operate and maintain the same, or to take care of and irrigate said orchards.

Your orators further aver that said mortgage or deed of trust of June 1, 1909, provides that upon filing a bill in equity or upon commencement of any judicial proceeding to enforce any right of the trustees or of the bondholders under said indenture, the trustees shall be entitled as a matter of right to the

appointment of a receiver of the property subject to said indenture and of the tolls, earnings, income, revenue, rents, issues and profits thereof, with such powers as the court making such appointment shall confer.

And your orators further aver that by reason, among others, of the foregoing facts and circumstances, your orators allege that the interference of a court of equity for the protection of their rights and the rights of all parties in interest herein is immediately required and that there is necessity for the immediate appointment of a receiver to take charge of and preserve the property of said Bitter Root Valley Irrigation Company subject to said mortgage or deed of trust dated June 1, 1909; to put the said irrigation system of the Bitter Root Valley Irrigation Company in position to deliver water immediately, to maintain and operate said irrigation system for the protection of settlers in the Bitter Root Valley in accordance with their rights under contracts with said Company; [108] to take care of and irrigate the orchards of the Bitter Root Valley Irrigation Company, and to collect and receive and properly to appropriate the income of and from said property of the Bitter Root Valley Irrigation Company under the orders of this court to be made from time to time until its final decree in the premises.

And your orators further aver that the matter in controversy herein exceeds the sum of five thousand dollars exclusive of interests and costs.

XIX.

Forasmuch, therefore, as your orators are without remedy in the premises according to the strict rules of the common law and can only have relief in a court of equity, where matters of this kind are properly cognizable, your orators pray the aid of this Honorable court to the end:

(1) That the said defendants may be required to make answer severally unto all and singular the matters hereinbefore stated and charged, as fully and particularly as if thereunto particularly interrogated, but not under oath, answer under oath being hereby expressly waived.

(2) That an accounting may be taken of all property subject to the lien of said mortgage or deed of trust dated June 1, 1909, and that said mortgage or deed of trust may be decreed to be a valid lien upon all and singular the lands, buildings, structures, irrigation systems, water rights, contracts, agreements, purchase money mortgages, notes, choses in action, and other property of every kind and description, subject to the lien thereof as hereinbefore alleged and shown, together with all the appurtenances, rights and privileges thereunto belonging or in any wise appertaining, including the income, rents, issues and profits thereof and all improvements and additions thereto made since the date of said mortgage or deed of trust. [109]

(3) That the Bitter Root Valley Irrigation Company and the said other defendants herein named may be decreed to pay, by a short day to be fixed by this Honorable court, unto your orators, for the

use and benefit of the bondholders under the aforesaid mortgage or deed of trust, the principal of all of said bonds, and also all interest due and payable on said bonds, together with all costs and expenses in this suit incurred and contracted, including the compensation of your orators and their attorneys and solicitors, and all other indebtedness due under the terms and provisions of said mortgage or deed of trust, and in default thereof that the Bitter Root Valley Irrigation Company, and all persons and corporations claiming under it, may be forever barred and foreclosed of all equity of redemption and claim in and to said mortgaged premises and property and every part and parcel thereof, and that all and singular the said mortgaged premises and property, together with the appurtenances and effects, rights and privileges thereunto belonging or appertaining, in said mortgage or deed of trust described, or subject to the lien thereof as hereinbefore set forth, may be sold under a decree of this Honorable court and that the purchase money, proceeds, or avails of any such sale may be applied as follows, to wit:

First. To the payment of the costs, expenses, fees and other charges of such sale and all proceedings leading to such sale, including reasonable compensation to your orators and to their attorneys or solicitors, and to the payment of all expenses and liabilities incurred and advances or disbursements made by your orators or either of them, or by any holders of bonds, under the terms of said mortgage or deed of trust, and then to the payment of all

taxes, charges, assessments or liens prior to the lien of said mortgage or deed of trust, if any, except the superior liens and any taxes, assessments or other charges subject to which such sale shall be made, if any. [110]

Second. Any balance then remaining, to the payment of the whole amount then owing or unpaid upon the bonds secured by said mortgage or deed of trust for principl and interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon said bonds, then to the payment of said principal and interest, without preference or priority of principal over interest or of interest over principal or of any installment of interest over any other installment of interest, ratably to the aggregate of such principal and interest and the accrued and unpaid interest, in accordance with the terms and provisions of said mortgage or deed of trust.

Third. To the payment of the surplus, if any, to to the Bitter Root Valley Irrigation Company, its successors or assigns, or to whomsoever this Honorable court shall decree to be lawfully entitled to receive the same.

That upon any such sale any purchaser, for or in settlement or payment of the purchase price of the property purchased, may be permitted to use and to apply any of said bonds secured by said mortgage or deed of trust, at par, and any matured and unpaid interest coupons thereto attached, by presenting such bonds and coupons in order that there may be credited thereon the sums applicable to the

payment thereof out of the net proceeds of said sale to the owner of said bonds and coupons as his ratable share of such net proceeds after the deduction of all costs, expenses, compensations, and other charges, and that upon such application such purchaser may be credited on account of such purchase price payable by him with the portion of such net proceeds that shall be applicable to the payment of and that shall have been credited upon the payment of the bonds and coupons so presented, and that at any such sale any bondholders may bid for and purchase said property and make payment therefor as aforesaid and upon compliance with the terms of sale may hold, retain and dispose of such property without [111] further accountability; and your orators further pray that an accounting may be taken of the bonds secured by said mortgage or deed of trust, and of the amount due upon said bonds for principal and interest, and of the amounts due for the expenses, liabilities and advances of your orators and of their attorneys and solicitors herein; and that the Bitter Root Valley Irrigation Company and all other defendants herein and all persons claiming by, through or under them or either of them may be decreed to make such transfer or conveyance to the purchasers of said property at any sale to be ordered by this Honorable court as may be necessary and proper to put them or either of them in possession and control of said property; and that a receiver may be appointed, according to the custom and practice of this Honorable court, with the usual powers of receivers in like cases, of all and singu-

lar the property of the Bitter Root Valley Irrigation Company subject to said mortgage or deed of trust of June 1, 1909, together with all of the tolls, earnings, income, revenue, rents, issues and profits thereof, and with full power and authority to take possession of all of said property of the Bitter Root Valley Irrigation Company, to put said irrigation system in condition to deliver water, to operate and maintain the same, and to cultivate and irrigate the orchards of the Bitter Root Valley Irrigation Company and to collect and receive the tolls, earnings, income, revenue, rents, issues and profits thereof, and to apply the same under the orders and decrees of this court, and that the said Bitter Root Valley Irrigation Company and the said F. C. Webster, as Trustee in bankruptcy as aforesaid, may be required to transfer and turn over to such receiver all of said properties; and that your orators may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this Honorable court shall seem meet. [112]

XX.

May it please your Honor to grant unto your orators a writ or writs of subpoena, to be directed to the defendants, Bitter Root Valley Irrigation Company, F. C. Webster, Trustee in bankruptcy of the Bitter Root Valley Irrigation Company, Hans B. Knudsen, Caroline Knudsen, Helen E. Carter, Max Bennett, Henry Bennett, Joseph Zitka and W. G. Parks, therein and thereby commanding them and each of them, at a certain time and under a certain

penalty to be named, to be and appear before your Honor in this Honorable court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to, abide by and perform such other and further orders and decrees as this Honorable court may enter herein.

FIRST TRUST AND SAVINGS BANK,
Trustee,

[Corporate Seal]

By EMILE K. BOISOT,
President,
EMILE K. BOISOT,
Trustee.
Complainants.

GARRARD B. WINSTON,
HENRY C. STIFF,
Solicitors for Complainants. [113]

United States of America,
District of Montana,
Missoula County,—ss.

Garrard B. Winston, being first duly sworn, deposes and says that he is the agent of and one of the solicitors for First Trust and Savings Bank and Emile K. Boisot, the above named complainants; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true; that the seal affixed to said bill of complaint is the

corporate seal of said First Trust and Savings Bank, and was so affixed by its authority.

GARRARD B. WINSTON,

Subscribed and sworn to before me this 8th day of April, A. D. 1916.

THOMAS NELSON MARLOWE,

[Notarial Seal]

Notary Public in and for the State of Montana, Residing at Missoula, Montana.

My commission expires March 9th 1917. [114]

(Endorsed as follows:)

In the District Court of the United States, for the District of Montana. In Equity—No. 71. First Trust and Savings Bank and Emile K. Boisot, Trustees, Complainants, vs. Bitter Root Valley Irrigation Company, F. C. Webster, Trustee in Bankruptcy of Bitter Root Valley Irrigation Company, Hans B. Knudsen, Caroline Knudsen, Helen E. Carter, Max Bennett, Henry Bennett, Joseph Zitka and W. G. Parks, Defendants. Bill of Foreclosure. Garrard B. Winston, Winston, Payne, Strawn & Shaw, Henry C. Stiff, Solicitors for Complainants. Filed April 8, 1916. Geo. W. Sproule, Clerk. [115]

Thereafter, on September 4, 1916, the Answer of defendants Hans B. Knudsen and Caroline Knudsen was duly filed herein, in the words and figures following, to wit: [116]

In the District Court of the United States, for the District of Montana.

FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,

Complainants,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of Bitter Root Valley Irrigation Company, HANS KNUDSEN, CAROLINE KNUDSEN, HELEN E. CARTER, MAX BENNETT, HENRY BENNETT, JOSEPH ZITKA and W. *J.* PARKS,

Defendants.

Answer.

Come now the defendants Hans B. Knudsen and Caroline Knudsen and expressly saving and reserving unto themselves all exceptions heretofore taken, and allowed, to the order of the above styled court in overruling and denying the special appearance of these defendants challenging the jurisdiction of this court over them and praying that the order for appearance of nonresident defendants served upon these answering defendants should be quashed and held to be of no force and effect to give this court jurisdiction of either the person or property rights of these defendants, and now specially objecting to the jurisdiction of this court over them upon each and all of the grounds assigned in said special appearance, and saving and reserving unto themselves

all manner of exception thereto and to the jurisdiction of this court, and appearing only because of the overruling of their plea to the jurisdiction of this court and not otherwise;

I.

Admit the allegations of paragraphs I, II, III, X, XV and XVI of the bill of complaint of complainants herein filed. Also admit that on or about June 1, 1909, there was signed by the Bitter Root Valley Irrigation Company and delivered to complainants a [117] written instrument a copy whereof appears on pages 1 to 84 inclusive in paragraph numbered IV of complainants' bill of complaint; and admit that the property alleged in paragraph IV to be situated in Ravalli County was and is situated within said county. Admit that complainants accepted the trust assumed to be created in said written instrument; admit that the Bitter Root Valley Irrigation Company issued bonds as of the dates and of the numbers and in the amounts as alleged in paragraph IV of the complainants' bill of complaint; admit that such bonds were delivered to the complainants and that said bonds aggregated the par value of $1,376,000; admit that all of the bonds and the interest coupons alleged in said paragraph IV to be outstanding and unpaid are in fact outstanding and unpaid. Admit that these answering defendants claim some interest in and to the mortgaged property.

II.

As to paragraphs numbered VI, VII, VIII, IX, XI, XII, XIII, and XIV of the bill of complaint on file herein, these answering defendants deny that

they have any knowledge or information sufficient to form a belief as to the allegations therein contained and therefore demand proof thereof.

III.

These answering defendants specifically deny that their interest in and lien upon the premises described in the bill of complaint on file herein is either inferior or subject to the rights or liens of complainants upon said property either under and by virtue of the terms and provisions of said mortgage or deed of trust or otherwise or at all.

IV.

And save as above specifically admitted or denied in this answer, these answering defendants generally deny the allegations contained in complainants' bill of complaint.

V.

Further answering and by way of defense to the maintenance and prosecution of this action as against these answering defendants [118] or the rights or claimed rights of them or either of them, and as against the maintenance and prosecution of this action for the determination of the rights or claimed rights or liens or claimed liens of these answering defendants or either of them, they respectfully show unto this honorable court as follows:

1. That on the 24th day of June, 1915, the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli was and for a long time prior thereto had been and now is a court of general jurisdiction, created, organized and existing under and by virtue of the constitution

and laws of the State of Montana, and as such court of general jurisdiction during all of said times has had and now has jurisdiction of all matters cognizable under the common law by courts either of law or of equity and particularly having jurisdiction of actions in form either legal or equitable or both legal and equitable wherein was or is sought in any manner or form the determination of questions of conflicting interests in and to real and personal property within the limits of the County of Ravalli, State of Montana; that said Court was at all of said times and now is a court of record and was at all of said times and now is fully authorized and empowered and had and now has full and complete jurisdiction under the constitution and laws of the State of Montana to adjudicate fully and finally as between any and all parties claiming rights, interests or liens of any kind, character or description of in and to real property or personal property within the limits of the State of Montana and to make and enforce all orders necessary and proper in connection therewith, and particularly was said court and is it now vested under the constitution and laws of the State of Montana with full and complete power, authority and jurisdiction to adjudicate with reference to the claims advanced or to be advanced in connection with the matters sought by the complainants herein to be made the subject of this bill of complaint with reference to the claims, interests and [119] liens asserted by these answering defendants relating to the real property and personal property of the Bitter Root Valley Irrigation Com-

pany and with reference to the real and personal property in the bill of complaint herein filed; and also with reference to any matters or claims in any manner connected with the foregoing and asserted or to be asserted by any person or persons whomsoever, or any corporation or corporations whatsoever.

2. That on the 24th day of June, 1915, these answering defendants as plaintiffs commenced in the aforesaid District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli and against the Bitter Root Valley Irrigation Company, a Montana corporation, Emile K. Boisot, complainant named in the bill of complaint on file in this action, First Trust and Savings Bank, complainant named in the bill of complaint on file in this action, and against other persons and corporations interested in the affairs and property of and connected with the said Bitter Root Valley Irrigation Company, as defendants, an action wherein these answering defendants as such plaintiffs alleged among other things that said Bitter Root Valley Irrigation Company by succession to the rights of prior holders thereof became the owner of large quantities of real property situated within the County of Ravalli, State of Montana, and had by succession, and adoption of contracts, plans and agreements of its corporate predecessor in interest, assumed the formation, construction and operation of a so-called irrigation district or system to be composed of a total of 40,000 acres of land and of water rights for the irrigation thereof, the irrigation to be furnished by means of waters naturally flowing and

artifically stored and collected and thereafter to be delivered onto and upon said 40,000 acres of land by means of one main and a large number of branch canals, laterals and ditches. That in and by said complaint these answering defendants further charged that as an inducement to the purchase of lands of and from the said Bitter Root Valley Irrigation Company it had caused to be represented to the plaintiffs therein and to other contemplating purchasers of land from [120] it, that an irrigation system to the extent of 40,000 acres was so to be formed, constructed and operated and that water therefor was to be supplied in the manner above set out; and that said Bitter Root Valley Irrigation Company promised and agreed to and with these answering defendants and with others similarly situated, that said corporation would acquire not only the above-mentioned 40,000 acres of land, but would also acquire water rights sufficient to irrigate the whole thereof, and further promised and agreed with these answering defendants and with others similarly situated, that it would maintain said water right as proposed to be acquired and furnish therefrom through main and branch canals and laterals and ditches to be constructed by it to these answering defendants and to others similarly situated a water right in perpetuity or a right to the perpetual use of water in a designated quantity for the purpose of irrigation of lands purchased of and from it and located within the proposed district as above outlined the same to be furnished for the sum of $1.25 per acre of irrigable lands, payable annually;

and that said corporation did further in that connection promise and agree with these answering defendants and others similarly situated that it would provide a means for the up-keep and maintenance of the water rights so proposed to be acquired and of the system of storage and diversion of said water rights so that the perpetual right to the use of waters for said land should be assured to all purchasers of lands from it, including these answering defendants, and proposed in that connection and for the accomplishment of that end, to assess and tax each and every acre of irrigable lands sold or unsold by it in said system, to wit, lands to the extent of 40,000 acres, with the sum of $1.25 per acre, the sum of money so realized to be used only for the purpose of maintenance and up-keep of the system as above outlined and for no other purposes. That in said action it was further charged by these answering defendants that in pursuance of such representations said Bitter Root Valley Irrigation Company had proceeded with the acquisition of lands and water rights with the construction of a system for the storage [121] and distribution of said water and upon the strength of the covenants and agreements as heretofore alleged, had sold or contracted for sale of and from said total acreage of 40,000 acres approximately 22,000 acres of lands to a great number of individuals and corporations throughout the United States, including these answering defendants, for which said 22,000 acres of land said Bitter Root Valley Irrigation Company had been assuming to furnish water as covenanted and for which service

it had been for a large number of years collecting the $1.25 per acre charge as above mentioned; and that said corporation in addition to said lands had been irrigating over a large number of years of and from the above-mentioned waters approximately 3,500 acres of land situated within the said district of 40,000 acres of land, but for which water and the use thereof, said Bitter Root Valley Irrigation Company had not been paying the aforesaid $1.25 per acre charge nor had said Bitter Root Valley Irrigation Company been paying as covenanted and agreed the aforesaid charge of $1.25 per acre for unsold lands situated within said district. That further in and by the complaint filed in the action in the aforesaid district court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli, it was alleged that said Bitter Root Valley Irrigation Company had not only failed to make payments of $1.25 per acre on lands held and owned by it and situated within said district and on all lands irrigated by it and situated within the said district but that it had also squandered and dissipated the funds raised and furnished by the payments of the $1.25 per acre charge on lands sold to others and had used such funds for purposes other than those incident to the up-keep and maintenance of the system for the storage and diversion of the aforesaid waters. That in and by said action and the complaint filed therein, it was alleged that the said Bitter Root Valley Irrigation Company had failed to acquire water rights sufficient for the purpose of the per-

formance of its covenants hereinbefore set out, and had failed to construct an irrigation system sufficient in size to irrigate lands to be embraced within said district or system, and had failed to use proper care to even maintain the system as actually constructed [122] in proper condition for the service contemplated and proposed thereby, but on the contrary had allowed the same to depreciate to such an extent and had constructed the same originally so improperly as that there was an immediate demand for the expenditure of large sums of money for the purpose of restoration of the irrigation system to a proper condition for service and for the expenditure of further large sums of money for the completion of said system to the degree covenanted by the said Bitter Root Valley Irrigation Company. That in and by the said action and complaint therein filed, it was further alleged that said Bitter Root Valley Irrigation Company was then insolvent and unable to meet its outstanding obligations and was without funds and unable to make needed repairs in said system for the storage and diversion of the above-mentioned waters and without funds and unable to complete the construction of said system as originally covenanted and that said Bitter Root Valley Irrigation Company was without funds to replenish the wasted and squandered funds which constituted a trust fund for the maintenance and up-keep of said system for the storage and diversion of the above mentioned waters; that said Bitter Root Valley Irrigation Company did not intend to carry out or perform further any of its covenants and obligations

as above outlined and that it at that time contemplated and threatened the institution of voluntary bankruptcy proceedings for the purpose of escaping the results of any litigation of the character of this action and for the purpose of escaping further compliance with its covenants and obligations as above set out. That further in and by said action and the complaint filed therein it was alleged that the funds realized from the $1.25 per acre water charge as above set out, were agreed to be regarded as a trust fund for the up-keep and maintenance of the aforesaid system and were by virtue of the covenants and agreements of the parties and the facts and circumstances heretofore alleged in fact a trust fund for such purpose; and that the $1.25 per acre charge above mentioned as due and payable from the said Bitter Valley Irrigation Company upon all unsold [123] lands and upon lands irrigated by it was likewise to be regarded upon each and all the grounds above set forth as a trust fund; and these answering defendants therein alleged that by and because of the existence of such trust fund and of its wasting and squandering by the Bitter Root Valley Irrigation Company as above set forth, these answering defendants and others similarly situated had by virtue of the premises and by operation of law and equity a first and prior lien and claim upon all of the assets of every kind, character and description of the Bitter Root Valley Irrigation Company to secure the restoration and establishment of said trust fund and as security for the performance of each and all of the covenants and agreements of said

Bitter Root Valley Irrigation Company as heretofore alleged. That further in and by said action and the complaint therein filed, it was alleged that the complainants herein Emile K. Boisot and First Trust and Savings Bank and the bondholders in the bill of complaint in this action referred to, each and all took the bonds and deed or trust given to secure the payment of the same with notice of the covenants and agreements of the said Bitter Root Valley Irrigation Company herein above-mentioned, and that the lien if any created by the deed of trust given in connection with the bond issue of $1,376,000 in the bill of complaint herein referred to was inferior in point of time and right to the lien claimed by these answering defendants on behalf of themselves and of all others similarly situated. That further in and by said action and the bill of complaint therein filed, it was alleged that pursuant to the covenants and agreements of the Bitter Root Valley Irrigation Company with its purchasers, it was necessary that the irrigation system should be completed as contemplated and covenanted and that to that end and to secure the enforcement of the lien claimed by these answering defendants as aforesaid, required that a receiver of the properties and assets of said Bitter Root Valley Irrigation Company should be appointed and that receiver's certificates should be issued and that the assets [124] of the Bitter Root Valley Irrigation Company should be marshalled and placed in the custody of the Court for the purpose of completing the irrigation system as contemplated and covenanted, for the purpose of the

full and complete performance of the covenants of said Bitter Root Valley Irrigation Company with the purchasers of lands from and under it, and for the purpose of insuring to all purchasers of lands of and from said company, including plaintiffs therein the right to the perpetual use of water for the irrigation of their lands and that to secure such results it was necessary that the lands of said Bitter Root Valley Irrigation Company should be sold under order of Court. That further in and by said action and the complaint therein filed it was alleged that these answering defendants instituted said action on behalf of all purchasers of land of and from the Bitter Root Valley Irrigation Company for the reason that their number was so great that they could not practically be joined as plaintiffs therein and for the reason that the relief sought was one of public interest and one relating to all similarly situated.

3. That thereafter and under date of July 14, 1915, the said Bitter Root Valley Irrigation Company made its general appearance in said action pending in the aforesaid State Court and thereafter and under date of January 31, 1916, the said Emile K. Boisot and First Trust and Savings Bank made their special appearance in said action challenging the jurisdiction of the State Court to render judgment therein affecting their interest; and thereafter and under date of April 5, 1916, and prior to the institution of this action in this District Court of the United States for the District of Montana, the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli,

after argument of said special appearances challenging its jurisdiction duly made and entered its order overruling and denying the same, and assumed and declared its assumption of jurisdiction of the action so far as it concerned said Emile K. Boisot and said First Trust and Savings Bank and assumed **[125]** and declared its assumption of jurisdiction to determine all questions of their rights or interests in the property of Bitter Root Valley Irrigation Company.

4. That the real property and personal property of Bitter Root Valley Irrigation Company referred to in the complaint filed in the action pending in the aforesaid State Court was and is, so these answering defendants state upon their information and belief the same property as that specifically described in the bill of complaint herein filed and that the rights and interests of said Emile K. Boisot and First Trust and Savings Bank referred to in the complaint filed in the aforesaid action pending in the said State Court and the determination whereof was therein sought are the same rights and interests as are sought to be determined in this action in the United States Court, and that the rights and interests of these answering defendants asserted and sought to be determined in said court are the same rights and interests which are challenged by the proceeding instituted by the said Emile K. Boisot and said First Trust and Savings Bank in this United States Court. That this present action in the United States Court was not commenced until on or about the 8th day of April, 1916, and until long after the institution of

the aforesaid State Court suit and of the acquisition of jurisdiction therein over and of the persons and property of said Emile K. Boisot and said First Trust and Savings Bank and that this present action pending in this United States Court was commenced by the complainants herein after and with full knowledge of the institution of the aforesaid State Court suit and of the acquisition and claim of jurisdiction of the said Court over their persons and property and with full knowledge of the purposes and objects of the aforesaid State Court suit; and that this present action pending in this United States Court was instituted by the complainants herein for the purposes of attempting to defeat the jurisdiction of the aforesaid State Court and to secure a determination of their rights in a tribunal other than that which first acquired jurisdiction of the subject matter of this present suit. **[126]**

5. That as appears from the complaint filed in the action pending in the aforesaid State Court it is probable or possible that at some stage of the litigation therein the appointment of a receiver will be necessary to accomplish the execution of the judgment and decree of said State Court and that the receiver so to be appointed must be one of the selection of said State Court and subject alone to its jurisdiction. That in the course of the prosecution of the aforesaid action now pending in the State Court all matters and issues presented in this subsequently commenced and pending action in this United States Court can be as fully and fairly determined therein as herein and that it is the in-

tention of these answering defendants Hans B. Knudsen and Caroline Knudsen to prosecute and determine in said State Court the issues therein raised and to determine the rights and claims not only of the defendants Emile K. Boisot and First Trust and Savings Bank but of all others in any manner or fashion having or claiming any interest in and to said property.

6. That subsequently to the institution of the above-mentioned action of the State Court the said Bitter Root Valley Irrigation Company did on the 3d day of January, 1916, file in the District Court of the United States for the District of Montana, its voluntary petition for adjudication as a bankrupt and thereafter and on the same date, an order was made adjudging said corporation to be a bankrupt, and thereafter, and under date of February 23, 1916, one F. C. Webster was appointed as trustee in bankruptcy of said Bitter Root Valley Irrigation Company, and the said Webster is now the duly appointed, qualified and acting trustee in bankruptcy of said corporation.

WHEREFORE these answering defendants pray that by virtue of the circumstances aforesaid and of the comity recognized and existing between courts of concurrent jurisdiction that this United States Court shall either:

1. Proceed no further in this present pending action in any manner, or at all, and shall permit said action to remain in *status quo* and subject to further orders relative to property now in the [127] possession of its receiver; or,

2. Shall proceed in this present action only with the express reservation that therein shall be determined the rights of complainants Emile K. Boisot and First Trust and Savings Bank only against and with reference to said Bitter Root Valley Irrigation Company and said F. C. Webster, trustee in bankruptcy, but not with reference to the rights or claimed rights of any others of the defendants herein named and particularly not with reference to the rights or claimed rights of these answering defendants and others similarly situated, and with the further express reservation that the determination of the rights of said Emile K. Boisot and said First Trust and Savings Bank with respect to said Bitter Root Valley Irrigation Company and its properties and with respect to F. C. Webster as trustee thereof shall be in all respects subject and subordinate to any orders which may hereafter be made by the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli with reference either to the complainants herein or to the defendants Bitter Root Valley Irrigation Company, or to F. C. Webster as trustee, and with reference to the property and assets of said Bitter Root Valley Irrigation Company; and with the further express reservation that the possession of the receiver by this Court heretofore appointed shall be likewise subordinate to any orders of the State Court which may be made with reference to the property and assets of said Bitter Root Valley Irrigation Company;

3. That this Court shall authorize and direct said

F. C. Webster as trustee in bankruptcy of said Bitter Root Valley Irrigation Company to enter an appearance in the aforesaid State Court for the purpose of representing the interests of said bankrupt in the matters therein involved, and,

4. That these defendants have and recover their [128] costs of suit thus far herein expended.

(Signed) D. S. WEGG,
GEO. T. BAGGS,
R. F. GAINES,

As Attorneys for Defendants Hans B. Knudsen and Caroline Knudsen.

State of Montana,
County of Silver Bow,—ss.

R. F. Gaines, being first duly sworn, says:

I am one of the attorneys for the defendants named as answering defendants in the foregoing answer and make this verification on their behalf for the reason that defendants are not now in the County of Silver Bow, State of Montana, wherein resides affiant their said attorney; I have read the foregoing answer and know the contents thereof, and the matters and facts therein stated are true to the best of my knowledge, information and belief.

(Signed) R. F. GAINES.

Subscribed and sworn to before me this 2d day of September, A. D. 1916.

[Seal] (Signed) P. B. GOODWIN,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires June 13, 1917.

[Endorsed]: No. 71. U. S. District Court, District of Montana. First Trust and Savings Bank, and Emile K. Boisot, Trustees, Complainants, vs. Bitter Root Valley Irrigation Company et al., Defendants. Answer of Defendants Hans B. Knudsen and Caroline Knudsen. Filed Sept. 4th, 1916. George W. Sproule, Clerk. **[129]**

Thereafter, on September 12, 1916, Motion to Strike from the Answer of Hans B. Knudsen and Caroline Knudsen was duly filed herein, in the words and figures following, to wit. **[130]**

In the District Court of the United States for the District of Montana.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Complainants,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of the BITTER ROOT VALLEY IRRIGATION COMPANY, HANS B. KNUDSEN, CAROLINE KNUDSEN, HELEN E. CARTER, MAX BENNETT, HENRY BENNETT, JOSEPH ZITKA and W. J. PARKS,

Defendants.

Motion to Strike from the Joint Answer of Hans B. Knudsen and Caroline Knudsen.

Come now the complainants in the above-entitled cause and move the Court for an order striking out

of and from the joint answer of the defendants Hans B. Knudsen and Caroline Knudsen all that portion thereof embraced within paragraph No. V and beginning with the words "further answering" on page two and ending with the words "qualified and acting trustee in Bankruptcy of said corporation," on page eleven of said answer, the matter so contained in said paragraph V being subdivided into paragraphs or clauses numbered 1, 2, 3, 4, 5 and 6, and being that portion of the said answer of the said defendants wherein is alleged and set forth the institution and pendency of a certain action in the District Court of the Fourth Judicial District of the State of Montana in and for Ravalli County and challenging the jurisdiction of this Court to hear, adjudicate and determine matters and things therein alleged to be before the said State Court for adjudication and determination.

This motion is made and based upon the reasons and [131] grounds following:

1. That the same is irrelevant.
2. That the same is redundant.
3. That the same is immaterial.
4. That the matter moved to be stricken and the whole thereof is sham and frivolous.

WINSTON, PAYNE, STRAWN & SHAW
and
HENRY C. STIFF,
Attorneys for Complainants.

Service by copy of the foregoing Motion to Strike

is hereby accepted and acknowledged this 7th day of September, 1916.

D. S. WEGG,
GEO. T. BAGGS,
R. F. GAINES,

Attorneys for Defendants Hans B. Knudsen and Caroline Knudsen.

[Endorsed]: No. 71. In the U. S. District Court of the District of Montana. First Trust and Savings Bank et al., Trustees, Complainants, vs. Bitter Root Valley Irrigation Company et al., Defendants. Motion to Strike from the Answer of Hans B. Knudsen and Caroline Knudsen. Filed Sept. 12, 1916. George W. Sproule, Clerk. By Harry H. Walker, Deputy. **[132]**

Thereafter, on October 16, 1916, the Memo Decision of the Court, granting plaintiff's Motion to Strike from the Answer of Hans B. Knudsen and Caroline Knudsen, was duly filed herein, in the words and figures following, to wit: **[133]**

Opinion on Motion to Strike Portions of Answer of Hans B. Knudsen and Caroline Kundsen.

United States District Court, Montana.

FIRST ETC. BANK et al.

vs.

BITTER ETC. CO. et al.

Defendant company in this court was adjudicated a voluntary bankrupt, and the appointed trustee took possession of its property. Plaintiffs, bond-

holders' trustees, by leave commenced this suit to foreclose the security on certain of said property, making defendants the bankrupt, the trustee and certain persons alleged to assert claims, but inferior to plaintiffs', to the property.

Therein the bankrupt's trustee was appointed receiver, and as such possesses the property. Said certain persons answered that more than four months prior to initiation of bankruptcy proceedings, they had commenced suit in a court of this State, wherein they allege that by virtue of land and water contracts in which the bankrupt was vendor and they were vendees, all said property is impressed with a trust and lien in their behalf and superior to that of plaintiffs, and that a receiver is necessary to take possession of said property to effectuate the trust and lien. They further answer that the plaintiffs and bankrupt were made defendants and appeared in said suit. The prayer is that this Court in recognition of comity suspend proceedings until the State Court has determined said suit, and if and when the State Court appoints a receiver, that this court surrender the property to him. Plaintiff move to strike the aforesaid defense. Granted.

The suit in the State Court is to determine rights asserted by some creditors of the bankrupt in and to some of the latter's [134] property. The proceedings in this court in their entirety are to determine the rights of all creditors of the bankrupt in and to all the latter's property. Of some of the matters involved herein the State Court has no jurisdiction, exclusive jurisdiction thereof being in

this court, finding origin in the Constitutional provision for bankruptcy. These latter cannot be fully adjusted without adjustment of those asserted in the State Court, and it makes for convenience, speed and justice to have the whole dealt with by one court. The rule of comity yields thereto. It is believed the rule of Moran vs. Sturges, 154 U. S. 284, applies, viz., that where the jurisdictions are not concurrent and co-ordinate—where that of one is exclusive—the Court first obtaining actual possession of the *res* is entitled to proceed. And having possession and jurisdiction, the property is withdrawn from the jurisdiction of all other courts, this court to hear and determine all questions relating to title, possession and control of the property.

See Murphy vs. Co., 211 U. S. 568.

Wabash Ry. Co. v. College, 208 U. S. 38, 611.

It will be noted that in the first case cited herein the State Court had appointed a receiver before the Federal Court took possession of the property, and in the last case cited the suit in the former court to foreclose a claim of lien had been commenced before the suit in the latter court was instituted and possession taken of the property. And in both it was held the Federal jurisdiction prevailed.

Metcalf vs. Barker, 167 U. S. 165, is the reverse of the instant case. The situation herein is not affected for that foreclosure proceedings are permitted by the Court in bankruptcy and a receiver appointed. The Court is the same, its possession is unchanged, and the foreclosure is but ancillary and dependent—more for convenience than aught

else. See Bear, etc. Co. vs. Walsh, 198 Fed. 352, and cases therein cited.

BOURQUIN, J.

Filed October 16, 1916. (Signed) Geo. W. Sproule, Clerk. By (Signed) H. Walker, Deputy. **[135]**

Thereafter, on October 16, 1916, a minute entry sustaining Motion to Strike, was duly entered herein, in the words and figures following, to wit:

Order Sustaining Motion to Strike from Answer of Hans B. Knudsen and Caroline Knudsen Petition for Appeal.

In the District Court of the United States, for the District of Montana.

No. 71.

FIRST TRUST & SAVINGS BANK et al.

vs.

BITTER ROOT V. I. CO. et al.

This cause heretofore submitted on the motions to strike from the answers herein, came on at this time for judgment and decision. Thereupon the Court, after due consideration, ordered that the motions to strike be and the same hereby are granted.

GEO. W. SPROULE,
Clerk.

Attest a true copy of Minute Entry, October 16, 1916.

[Seal] GEO. W. SPROULE,
Clerk.
By (Signed) Harry H. Walker,
Deputy Clerk. **[136]**

Thereafter, on November 9, 1916, a Petition for Appeal was duly filed herein by defendants Hans B. Knudsen and Caroline Knudsen, in the words and figures following, to wit: **[137]**

. .

In the District Court of the United States, District of Montana.

HANS B. KNUDSEN and CAROLINE KNUDSEN,
Appellants,
vs.
FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,
Appellees.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,
Complainants,
vs.
BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of BITTER ROOT VALLEY IRRIGATION COMPANY, HANS B. KNUDSEN, CAROLINE KNUDSEN, ELLEN E. CARTER, MAX BENNETT, HENRY BENNETT, JOSEPH ZITKA and W. G. PARKS,
Defendants.

Petition to U. S. District Judge for Allowance of Appeal.

The above-named appellants and defendants, Hans B. Knudsen and Caroline Knudsen conceiving themselves aggrieved by the order and decree entered on October 16, 1916, in the above-entitled proceeding, whereby there was upon motion of appellees and complainants, First Trust and Savings Bank and Emile K. Boisot, Trustees, stricken from the answer of said Hans B. Knudsen and Caroline Knudsen the portion thereof which pleaded the prior acquisition by the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli of jurisdiction over the parties and *res* involved in this action, do hereby appeal from said order and decree to the Circuit Court of Appeals of the United States, Ninth Circuit, and do hereby petition and pray for the allowance of this appeal and that a citation may issue in connection therewith, and do further pray that a transcript of the records and proceedings and papers upon which **[138]** said order and decree was made, duly prepared and authenticated may be sent to said Circuit Court of Appeals of the United States Ninth Circuit, at San Francisco, California, and that upon a consideration of said appeal that the order and decree appealed from shall be reversed by said Circuit Court of Appeals. Said appellants have hereto attached

and made a part hereof their assignments of errors relied upon by them.

(Signed) D. SWEGG,
GEO. T. BAGGS and
R. F. GAINES,

As Attorneys for Appellants and Defendants Hans B. Knudsen and Caroline Knudsen.

Dated November ——, 1916.

Memorandum of Bourquin, J., Re Petition for Appeal.

And now, to wit, on November ——, 1916, it is ORDERED that the appeal be allowed as prayed for.

_____,
District Judge.

The law allows appeals from "final decisions." The order of this Court striking matter from petitioners' answer is interlocutory only and not final. Hence, it can be reviewed on appeal from final decision or decree *future* made, no appeal lies from said order, and so should not in form be allowed.

BOURQUIN, J.

[Endorsed]: Filed Nov. 9, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. **[139]**

Thereafter, on November 9, 1916, an Assignment of Errors was duly filed herein by defendants Hans B. Knudsen and Caroline Knudsen, in the words and figures following, to wit: **[140]**

In the District Court of the United States District of Montana.

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Appellees,

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Complainants,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of BITTER ROOT VALLEY IRRIGATION COMPANY, HANS B. KNUDSEN, CAROLINE KNUDSEN, ELLEN E. CARTER, MAX BENNETT, HENRY BENNETT, JOSEPH ZITKA and W. G. PARKS,

Defendants.

Assignment of Errors.

Defendants and appellants Hans B. Knudsen and Caroline Knudsen above named in connection with

their petition for the allowance of appeal in this cause hereby specify the following particulars wherein error was committed in this said cause:

ERRORS OF LAW.

I.

The Court erred in sustaining motion of complainants and appellees First Trust and Savings Bank and Emile K. Boisot, Trustees, said motion being filed under date of September 12, 1916, to strike from the answer of said appellants and defendants, which said answer was filed September 4, 1916, all that portion thereof described as follows: "That portion thereof embraced within paragraph V [141] the matters so contained in said paragraph V being subdivided into paragraphs or clauses numbered 1, 2, 3, 4, 5, 6 and 7, and being that portion of said answer of said defendants wherein is alleged and set forth the institution and pendency of a certain action in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli, and challenging the jurisdiction of this Court to hear, adjudicate and determine the matters and things therein alleged to be before the State Court for adjudication and determination, and being further described as the portion of said answer wherein and whereby said appellants and defendants sought to plead facts demanding a stay of proceedings by this court pending the determination of the action pending in the aforesaid State Court.

II.

The Court erred, by sustaining the aforesaid mo-

tion to strike, in declining to hear and adjudicate the questions presented by the aforesaid plea.

WHEREFORE defendants and appellants above named, pray that the petition for the allowance of an appeal be granted, and that for the reason aforesaid and for divers and sundry other reasons the order and decree entered herein on the 16th day of October, 1916, be reversed.

(Signed) D. S. WEGG,
GEO. T. BAGGS and
R. F. GAINES,
As Attorneys for Defendants and Appellants Hans B. Knudsen and Caroline Knudsen.

[Endorsed]: In Equity. Filed Nov. 9, 1916. Geo. W. Sproule, Clerk. By (Signed) Harry H. Walker, Deputy Clerk. **[142]**

Thereafter, on November 21, 1916, there was duly filed herein a certified copy of a Petition for Allowance of Appeal of defendants Hans B. Knudsen and Caroline Knudsen, filed Nov. 16, 1916, in the United States Circuit Court of Appeals for the Ninth Circuit, together with a copy of the order of said Court allowing said appeal, which said Petition and Order are in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Appellees,

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Complainants,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of BITTER ROOT VALLEY IRRIGATION COMPANY, HANS B. KNUDSEN, CAROLINE KNUDSEN, ELLEN E. CARTER, MAX BENNETT, HENRY BENNETT, JOSEPH ZITKA and W. G. PARKS,

Defendants.

Petition for Allowance of Appeal. [143]

Hans B. Knudsen and Caroline Knudsen respectfully show to the above-entitled court that under date of October 16, 1916, there was made by the District Court of the United States for the District of Montana, a certain order and decree in the above-entitled proceeding whereby there was upon motion

of appellees and complainants, First Trust and Savings Bank and Emile K. Boisot, Trustees, stricken from the answer of said Hans B. Knudsen and Caroline Knudsen the portion thereof which pleaded the prior acquisition by the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli, of jurisdiction over the parties and *res* involved in this action, and thereafter conceiving themselves aggrieved by said order and decree, they did file in said District Court of the United States for the District of Montana, their certain petition for the allowance of an appeal of their assignment of errors in connection therewith, and thereafter presented the same to the Judge of said court, who denied said petition and refused to allow an appeal from said order;

Wherefore, conceiving themselves entitled thereto and being aggrieved as aforesaid by the making of the above-mentioned order and decree, do hereby appeal from said order and decree to the Circuit Court of Appeals of the United States, Ninth Circuit, and do hereby petition and pray for the allowance of this appeal and that a Citation may issue in connection therewith; and do further pray that a transcript of the records and proceedings and papers upon which said order and decree was made, duly prepared and authenticated, may be sent to said Circuit Court of Appeals of the United States for the Ninth Circuit at San Francisco, California; and that the penalty of an appropriate bond on appeal may be fixed upon the allowance of such appeal.

[144]

Said petitioners and appellants file and present herewith their assignment of errors relied upon.

R. F. GAINES,

As Attorney and Solicitor for Appellants and Defendants Hans B. Knudsen and Caroline Knudsen.

Dated November 16, 1916.

Order Allowing Appeal and Fixing Amount of Bond.

And now, to wit, on November 16, 1916, after due consideration of the foregoing petition, it is ordered that the appeal be allowed as prayed for and that appellants furnish in connection therewith a bond in proper form, the penalty whereof is hereby fixed at the sum of $300.

WILLIAM H. HUNT,

As Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Petition for Allowance of Appeal and Order Allowing the Same. Filed Nov. 16, 1916. F. D. Monckton, Clerk. **[145]**

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2878.

HANS B. KNUDSEN and CAROLINE KNUDSEN,
Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,
Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Petition for Allowance of Appeal, Order Allowing Appeal and Fixing Amount of Bond.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three (3) pages, numbered from and including 1 to and including three, to be a full, true and correct copy of Petition for Allowance of Appeal, Order Allowing Appeal and fixing amount of bond, filed in the above-entitled cause on the 16th day of November, A. D. 1916, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of November, A. D. 1916.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Title of Court and Cause. Certified Copy of Petition for Allowance of Appeal, Order Allowing Appeal and Fixing Amount of Bond. Filed Nov. 21, 1916. Geo. W. Sproule, Clerk. **[146]**

Thereafter, on Dec. 9, 1916, a praecipe for transcript on appeal was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States, District Montana.

No. 71—IN EQUITY.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Complainants,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, et al.,

Defendants.

Praecipe for Portions of Record to be Incorporated in the Transcript on Appeal on Behalf of Hans B. Knudsen and Caroline Knudsen.

To Geo. W. Sproule, Clerk of the United States District Court, Helena, Montana.

Sir: You will kindly prepare and certify to a transcript or record on appeal in connection with appeal from an order made in the above-styled court and cause under date of October 16, 1916, which said order struck from the answer of Hans B. Knudsen and Caroline Knudsen certain portions thereof, appeal therefrom having been allowed by and out of the United States Circuit Court of Appeals for the Ninth Circuit, under date of November 16, 1916. Portions of paper or papers designated as follows:

(a) All portions of the bill of complaint filed by

plaintiffs in the above cause, save and except certain portions thereof being particularly described as follows:

The description contained in paragraph 1 commencing on page 8 of said bill of complaint and continuing to page 16 thereof.

The description contained in paragraph 2 of said bill of complaint and commencing on page 16 thereof and continuing to page 17. [147]

The description contained in paragraph 3, commencing on page 18 and continuing to page 20.

The description contained in paragraph 4, pages 20 to 22 thereof.

The description contained in paragraph 5, pages 22 to 25 thereof.

The description contained in paragraph VI, pages 88 and 89.

The description contained in paragraph VII, pages 89 to 95 thereof.

The description contained in paragraph VIII, pages 95 to 112 thereof.

The description contained in paragraph IX, pages 112 to 114 thereof.

The description contained in paragraph X, pages 114 to 140 thereof.

The description contained in paragraph XI, pages 140 to line 33 of page 176.

The description contained in paragraph XIII, pages 177 to 209.

And in lieu of omitted descriptions above-mentioned insert in each instance the following: "Here follows description of property."

(b) Answer of defendants Hans B. Knudsen and Caroline Knudsen filed in said cause under date of September 4, 1916.

(c) Motion to strike portions of said answer filed by complainants in this cause under date of September 12, 1912.

(d) Copy of order of court in memo form sustaining aforesaid motion made and filed under date of October 16, 1916.

(e) Minute entry in connection with order sustaining said motion, made under date of October 16th, 1916.

(f) Petition praying for allowance of appeal filed in said court and cause by Hans B. Knudsen and Caroline Knudsen under date of November 9, 1916.

(g) Assignment of errors filed in the above court and cause in connection with petition for allowance of appeal under date of November 9, 1916. [148]

(h) Certified copy of order allowing appeal made by the Honorable William H. Hunt, under date of November 16, 1916.

(i) Citation on appeal issued by the Honorable William H. Hunt, under date of November 16, 1916.

(j) Praecipe for transcript of record.

And you are further hereby requested to attach thereto your certificate in usual form, forwarding the same as required by law for printing, filing and docketing in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated December 8, 1916.

GEO. T. BAGGS,
D. S. WEGG,
R. F. GAINES,

As Attorneys for Defendants and Appellants Hans B. Knudsen and Caroline Knudsen.

[Endorsed]: Title of Court and Cause. Praecipe for Transcript. Filed Dec. 9, 1916. Geo. W. Sproule, Clerk. [149]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 149 pages numbered consecutively from 1 to 149, inclusive, is a full, true, correct and compared transcript of the pleadings, orders and decision and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellants for said record on appeal, except the Citation mentioned in said praecipe which is not a record of said District Court, including said praecipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk.

I further certify that the costs of the transcript of record amount to the sum of Fifty-nine & no/100 Dollars ($59.00), and have been paid by the appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 13th day of December, A. D. 1916.

[Seal] GEO. W. SPROULE,
Clerk. [150]

[Endorsed]: No. 2878. United States Circuit Court of Appeals for the Ninth Circuit. Hans B. Knudsen and Caroline Knudsen, Appellants, vs. First Trust and Savings Bank and Emile K. Boisot, Trustees, Appellees. Transcript of the Record. Upon appeal from the United States District Court for the District of Montana.

Filed December 18, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Appellees.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT,

Trustees,
Complainants,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of BITTER ROOT VALLEY IRRIGATION COMPANY, HANS B. KNUDSEN, CAROLINE KNUDSEN, ELLEN E. CARTER, MAX BENNETT, HENRY BENNET, JOSEPH ZITKA and W. G. PARKS,

Defendants.

Petition to U. S. Circuit Court of Appeals for Allowance of Appeal.

Hans B. Knudsen and Caroline Knudsen respectfully show to the above-entitled court that under date of October 16, 1916, there was made by the District Court of the United States for the District of Montana a certain order and decree in the above-

entitled proceeding whereby there was upon motion of appellees and complainants, First Trust and Savings Bank and Emile K. Boisot, Trustees, stricken from the answer of said Hans B. Knudsen and Caroline Knudsen the portion thereof which pleaded the prior acquisition by the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli of jurisdiction over the parties and *res* involved in this action and thereafter conceiving themselves aggrieved by said order and decree they did file in said District Court of the United States for the District of Montana their certain petition for the allowance of an appeal of their assignment of errors in connection therewith, and thereafter presented the same to the Judge of said court, who denied said petition and refused to allow an appeal from said order:

Wherefore, conceiving themselves entitled thereto and being aggrieved as aforesaid by the making of the above-mentioned order and decree, do hereby appeal from said order and decree to the Circuit Court of Appeals of the United States, Ninth Circuit, and do hereby petition and pray for the allowance of this appeal and that a citation may issue in connection therewith; and do further pray that a transcript of the records and proceedings and papers upon which said order and decree was made, duly prepared and authenticated, may be sent to said Circuit Court of Appeals of the United States for the Ninth Circuit at San Francisco, California; and that the penalty of an appropriate bond on appeal may be fixed upon the allowance of such appeal.

Said petitioners and appellants file and present herewith their assignment of errors relied upon.

R. F. GAINES,

As Attorney and Solicitor for Appellants and Defendants Hans B. Knudsen and Caroline Knudsen.

Dated November 16th, 1916.

Order Allowing Appeal and Fixing Amount of Bond.

And now, to wit, on November 16, 1916, after due consideration of the foregoing petition, it is ordered that the appeal be allowed as prayed for and that appellants furnish in connection therewith a bond in proper form, the penalty whereof is hereby fixed at the sum of $300.

WILLIAM H. HUNT,

As Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 2878. United States Circuit Court of Appeals for the Ninth Circuit. Hans B. Knudsen and Caroline Knudsen, Appellants, vs. First Trust & Savings Bank and Emile K. Boisot, Appellees. Petition for Allowance of Appeal and Order Allowing Same. Filed Nov. 16, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HANS B. KNUDSEN AND CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Appellees.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Complainants,

vs.

BITTER ROOT VALLEY IRRIGATION COMPANY, F. C. WEBSTER, Trustee in Bankruptcy of Bitter Root Valley Irrigation Company, HANS B. KNUDSEN, CAROLINE KNUDSEN, ELLEN E. CARTER, MAX BENNETT, HENRY BENNETT, JOSEPH ZITKA and W. G. PARKS,

Defendants.

Assignment of Errors.

Defendants and appellants Hans B. Knudsen and Caroline Knudsen above named in connection with their petition for the allowance of appeal in this cause hereby specify the following particulars wherein error was committed in this said cause:

ERRORS OF LAW.

I.

The District Court of the United States for the District of Montana erred in sustaining motion of complainants and appellees First Trust and Savings Bank and Emile K. Boisot, Trustees, said motion being filed under date of September 12, 1916, to strike from the answer of said appellants and defendants, which said answer was filed September 4, 1916, all that portion thereof described as follows: "That portion thereof embraced within Paragraph V, the matters so contained in said paragraph V being subdivided into paragraphs or clauses numbered 1, 2, 3, 4, 5 and 6, and being that portion of said answer of said defendants wherein is alleged and set forth the institution and pendency of a certain action in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli, and challenging the jurisdiction of said court to hear, adjudicate and determine the matters and things therein alleged to be before the State Court for adjudication and determination, and being further described as the portion of said answer wherein and whereby said appellants and defendants sought to plead facts demanding a stay of proceedings by this court pending the determination of the action pending in the aforesaid State Court.

II.

The said Court erred by sustaining the aforesaid motion to strike, in declining to hear and adjudicate the questions presented by the aforesaid plea.

WHEREFORE, defendants and appellants above named, pray that their petition for the allowance of an appeal be granted and that for the reasons aforesaid and for divers and sundry other reasons the order and decree entered in said court on the 16th day of October, 1916, be reversed.

R. F. GAINES,

As Attorney and Solicitor for Defendants and Appellants Hans B. Knudsen and Caroline Knudsen.

[Endorsed]: No. 2878. United States Circuit Court of Appeals for the Ninth Circuit. Hans B. Knudsen and Caroline Knudsen, Appellants, vs. First Trust & Savings Bank and Emile K. Boisot, Trustees, Appellees. Assignment of Errors. Filed Nov. 16, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Appellees.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That Hans B. Knudsen and Caroline Knudsen as principals and American Surety Company of New

York, a surety company, duly authorized by compliance with the laws of the State of Montana, to act as surety upon bonds and undertakings required by law, as surety are held and firmly bound unto First Trust and Savings Bank and Emile K. Boisot, Trustees, in the full and just sum of Three Hundred ($300) Dollars to be paid to said First Trust and Savings Bank and Emile K. Boisot, Trustees, their certain attorneys, executors, administrators, successors or assigns, for which payment well and truly to be made, we bind ourselves, our executors, administrators and successors jointly and severally firmly by these presents.

Sealed and dated this 24th day of November, in the year of our Lord nineteen hundred sixteen.

WHEREAS, lately at a District Court of the United States in a suit pending in said court between First Trust and Savings Bank and Emile K. Boisot, Trustees, as complainants, and Hans B. Knudsen and Caroline Knudsen and others as defendants, an order and decree was rendered against said Hans B. Knudsen and Caroline Knudsen, and said Hans B. Knudsen and Caroline Knudsen have obtained an appeal and filed a copy thereof in the clerk's office of said court, and in the United States Circuit Court of Appeals for the Ninth Circuit, and to reverse the decree in the aforesaid District Court of the United States for the District of Montana, and a citation has issued directed to said First Trust and Savings Bank and Emile K. Boisot, trustees, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for

the Ninth Circuit to be holden at the City of San Francisco in said circuit, within thirty days from the 16th day of November, 1916, then and there to show cause, if any there be, why the decree rendered against the said Hans B. Knudsen and said Caroline Knudsen should not be corrected and why speedy justice should not be done to the parties in that behalf.

NOW, the condition of the above obligation is such that if said Hans B. Knudsen and Caroline Knudsen shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation is void; otherwise to remain in full force and virtue.

HANS B. KNUDSEN and
CAROLINE KNUDSEN,
By R. F. GAINES,
As Their Attorney Hereto Duly Authorized.

[Seal] AMERICAN SURETY COMPANY OF NEW YORK,
By TED E. CALLISON,
Resident Vice-president.
Attest: J. R. C. SINE, Jr.,
As Its Resident Assistant Secretary Hereto.

Attest:

_____,

As Its ——— Hereto Duly Authorized.

The foregoing bond as to form and sufficiency of surety is hereby approved this 28th day of November, 1916.

WM. H. HUNT,
Judge Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: No. 2878. United States Circuit Court of Appeals for the Ninth Circuit. Hans B. Knudsen and Caroline Knudsen, Appellants, vs. First Trust and Savings Bank and Emile K. Boisot, Trustees, Appellees. Bond on Appeal. Filed Nov, 28, 1916. F. D. Monckton, Clerk.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to The First Trust and Savings Bank and Emile K. Boisot, Trustees, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the United States District Court for the ——— District of Montana, and also filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, Order Allowing such appeal being of record in said last-named office, wherein Hans B. Knudsen and Caroline Knudsen, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT, United States Circuit Judge for the Ninth Circuit, this 16th day of November, A. D. 1916.

WILLIAM H. HUNT,
United States Circuit Judge.

Received copies of above Citation this 24th day of November, A. D. 1916, at Chicago, Illinois.

WINSTON PAYNE.
STRAWN & SHAW,
GARRARD B. WINSTON.

United States of America,
State of Illinois, County of Cook,—ss.

On this 24th day of November, in the year of our Lord one thousand nine hundred and sixteen, personally appeared before me, Ernest A. Baughman, the subscriber, and makes oath that he delivered a true copy of the within citation to First Trust & Savings Bank, Trustee, a corporation, by delivering the same to Emile K. Boisot, the President thereof; also delivered a true copy to Emile K. Boisot, as trustee; also delivered a true copy to Messrs. Winston, Payne, Strawn & Shaw; and also delivered a true copy to Garrard B. Winston, of Counsel; all at Chicago, Illinois.

ERNEST A. BAUGHMAN.

Subscribed and sworn to before me at Chicago, Illinois, this 24th day of November, A. D. 1916.

[Seal] L. W. MAY,
Notary Public in and for Cook County, Illinois.

[Endorsed]: No. 2878. United States Circuit Court of Appeals for the Ninth Circuit. Hans B.

Knudsen and Caroline Knudsen, Appellants, vs. First Trust & Savings Bank and Emile K. Boisot, Trustees. Citation on Appeal. Filed Dec. 1, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Appellees.

Order Extending Time to January 4, 1917, to File Record and Docket Cause.

The request of Hans B. Knudsen and Caroline Knudsen appellants above named for an extension or enlargement of the time for the filing of the record on appeal in connection with the above matter and the docketing of said cause having been presented to the undersigned, a judge of the United States Court of Appeals for the Ninth Circuit, and good cause therefor appearing, it is ordered that the time for the filing of said record and the docketing of said cause shall be extended and enlarged so as to run to and inclusive of January 4th, 1917.

Dated December 1st, 1916.

WM. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 2878. United States Circuit Court of Appeals for the Ninth Circuit. Hans B. Knudsen and Caroline Knudsen, Appellants, vs. First Trust & Savings Bank and Emile K. Boisot, Trustees, Appellees. Order. Filed Dec. 1, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Appellees.

Praecipe for Certified Copy of Record on Appeal.

To F. D. Monckton, Esq., Clerk of the Above-styled Court:

As a part and portion of the transcript on appeal in the above cause, you are hereby requested to furnish under your certificate papers as follows:

(a) Petition for allowance of appeal filed in the above Court under date of November 16, 1916.

(b) Assignment of errors in connection with the aforesaid petition, also filed under date of November 16, 1916.

(c) Order allowing appeal as prayed for, said order being made under date of November 16, 1916.

(d) Citation on appeal issued under date of November 16, 1916.

(e) Undertaking on appeal filed in said cause.

(f) Praecipe for transcript of record.

Dated December 8, 1916.

R. F. GAINES,

As Attorney and Counsel for Appellants.

[Endorsed]: No. 2878. United States Circuit Court of Appeals for the Ninth Circuit. Hans B. Knudsen and Caroline Knudsen, Appellants, vs. First Trust and Savings Bank and Emile K. Boisot, Trustees, Appellees. Praecipe for Certified Copy of Record on Appeal. Filed Dec. 11, 1916. F. D. Monckton. Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK and EMILE K. BOISOT, Trustees,

Appellees.

Acceptance of Service of Praecipe for Portions of Record on Appeal.

Service and receipt of copy of praecipe for portions of record on appeal in connection with appeal of Hans B. Knudsen and Caroline Knudsen from Order of October 16, 1916, in the above matter admitted this 9th day of December, 1916.

HENRY C. STIFF,

Of Counsel for First Trust and Savings Bank and Emile K. Boisot, Trustees.

[Endorsed]: No. 2878. United States Circuit Court of Appeals for the Ninth Circuit. Hans B. Knudsen and Caroline Knudsen, Appellants, vs. First Trust and Savings Bank and Emile K. Boisot, Trustees, Appellees. Acceptance of Service. Filed Dec. 14, 1916. F. D. Monckton, Clerk.

No. 2878

United States
Circuit Court of Appeals
For the Ninth Circuit

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,

Appellees.

Brief of Appellants

Upon Appeal from the United States District Court for the District of Montana

MC KEE PTG. CO., BUTTE, MONT.

United States
Circuit Court of Appeals
For the Ninth Circuit

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,

Appellees.

Brief of Appellants

MC KEE PTG. CO., BUTTE, MONT.

United States
Circuit Court of Appeals
For the Ninth Circuit

HANS B. KNUDSEN and CAROLINE KNUDSEN,

Appellants,

vs.

FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,

Appellees.

Brief of Appellants

STATEMENT OF CASE.

On April 8, 1916, there was commenced in the District Court of the United States for the District of Montana, equity side, an action wherein First Trust and Savings Bank and Emile K. Boisot, as Trustees, appellees in this court, were named as complainants, and these appellants Hans B. Knudsen and Caroline Knudsen, together with Bitter Root Valley Irrigation Company, F. C. Webster, as Trustee in bankruptcy of that company, Helen E. Carter, Max

Bennett, Henry Bennett, Joseph Zitka and W. C. Parks were named as defendants. (Tr. p. 2, ll. 1-20.)

As far as concerns this appeal the defendants Max and Henry Bennett, Carter, Zitka and Parks require and shall receive no consideration.

The Bitter Root Valley Irrigation Company(hereinafter referred to as the Bitter Root Company) was, during all of the times hereinafter referred to, and now is a Montana corporation (Tr. p. 3, ll. 20-23); under date of January 3, 1916, upon a voluntary petition therefor filed in the said District Court of the United States an order was made, adjudging this company a bankrupt, and under date of February 23, 1916, F. C. Webster was appointed as trustee in bankruptcy thereof. (Tr. p. 132, ll. 9-22.)

On or about June 1, 1909, and continuing thereafter until January 3, 1916, the date of the bankruptcy adjudication, this Bitter Root Company owned, or had possessory rights to large quantities of land located in Ravalli County, State of Montana, the total quantity at one time and another in which it was so interested being around forty thousand acres, and of which total it had prior to January 3, 1916, sold or contracted for sale about twenty-two thousand acres; also during said times it owned or had possessory rights to the use of certain waters for irrigation purposes. (Tr. p. 4, l. 1 and pp. 122-124.)

On June 1, 1909, the Bitter Root Company made, executed and delivered to appellees a trust deed to secure

a bond issue of $1,376,000.00, assuming by said trust deed to create a lien upon all of its properties. (Tr. pp. 6-10.) Default being made in payments required by the trust deed, upon request of bondholders the action above mentioned was instituted to bring about a foreclosure of the trust deed and a sale of the properties covered thereby (Tr. pp. 103-105).

As may be determined from the bill of complaint, this proceeding is not one of and in the bankruptcy matter, but is entirely independent thereof.

The appellants in this court (made defendants in the United States Court because of a reputed interest in the properties of the Bitter Root Company), after disposition of motions and demurrers, filed, on September 4, 1916, their answer to the bill of complaint (Tr. p. 117, ll. 25-28). By this answer the relation of appellants to the controversy is shown. They are the purchasers of land and water rights from the Bitter Root Company and under date of June 24, 1915 (over six months prior to the bankruptcy adjudication above mentioned), instituted an action in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli, on behalf of themselves and of all other purchasers of lands and water rights from the Bitter Root Company who were similarly situated, against said Bitter Root Company, against appellees named above, and against other persons and corporations reputed to

have an interest in the properties of the Bitter Root Company (Tr. pp. 122-129).

Further by said answer it is made to appear that (a) The State Court last mentioned is a court having jurisdiction to determine such matters as are in that suit and in the United States Court sought to be determined; (b) that in making sales of lands owned by it the Bitter Root Company had agreed with appellants and other purchasers that it was constructing and would complete dams, ditches, pipe lines and other water carrying devices sufficient in size to convey waters, the right to the use of which they then owned, or would acquire, in quantities ample to properly irrigate lands to the extent of forty thousand acres; that each of said forty thousand acres of land would be required to pay annually $1.25, thus insuring each year a fund of $50,000.00—this fund to be used for maintenance and up-keep purposes alone; that the $1.25 per acre charge was to be in the nature of and in fact was a covenant running with the land and binding upon all persons owning or claiming the same; and that a right to use the water perpetually should pass with the lands sold; that approximately twenty-two thousand acres of land were so sold and that collections at the rate of $1.25 per acre per year had been made for a number of years; that the Bitter Root Company had used water upon about 3,500 acres of land, being by it cultivated under sales contracts, for several years without making payments, and had

also failed to pay the $1.25 per acre charge upon its unsold lands; also that written agreements of the above tenor had been made and recorded prior to the execution and delivery of the trust deed to complainants, and that complainants and all holders of bonds had notice of such charges against all lands covered by the trust deed.

The answer further charged misappropriation of moneys collected on account of the $1.25 per acre charge, which were collected as a part of a trust fund; that the Bitter Root Company had failed to complete to construction its water carrying system as agreed; that it was suffering the system as partially constructed to become unsafe and unfit for use; that it was without funds to make needed repairs; that without repairs no water could be furnished for perpetual use; that all funds realized from the collections above mentioned and due from the Bitter Root Company as above stated were in fact a trust fund necessary to insure the perpetual use of the waters for irrigation purposes.

(c) That because of these conditions a first and prior lien against the properties of the Bitter Root Company had been created years before and then existed in favor of all persons of the same class as complainants, this lien being directly alleged to be superior in point of time and right to the lien of the bondholders represented by appellees; that the appointment of a receiver of the properties of the Bitter Root Company was necessary to conserve its assets, to sell so

much of the properties of that company as should be required to make good the prior lien and the deficit in the trust funds and to take such action as should be appropriate to work a readjustment of the affairs of the company that would insure the perpetual supply of water agreed to be furnished. (Tr. pp. 122 to 128).

Under date of July 14, 1915, the Bitter Root Company made a *general appearance* in the state court suit; later, and under date of January 31, 1916, appellees made a special appearance in the state court suit; and under date of April 5, 1916, three days prior to the institution of the United States Court suit, the state court overruled the objections raised by the special appearance mentioned and declared its assumption of jurisdiction of appellees so far as was necessary to determine their interests in and to the properties of the Bitter Root Company (Tr. pp. 129-130).

The answer of appellants also contained the allegation that the property and property rights involved in each the state court and United States court were identical (Tr. p. 130); and, "That as appears from the complaint filed in the action pending in the aforesaid State Court it is probable or possible that at some stage of the litigation therein the appointment of a receiver will be necessary to accomplish the execution of the judgment and decree of said State Court and that the receiver so to be appointed must be one of the selection of said State Court and subject alone to its jurisdiction. That in the course of the prosecution of

the aforesaid action now pending in the State Court all matters and issues presented in this subsequently commenced and pending action in this United States Court can be as fully and fairly determined therein as herein and that it is the intention of these answering defendants Hans B. Knudsen and Caroline Knudsen to prosecute and determine in said State Court the issues therein raised and to determine the rights and claims not only of the defendants Emile K. Boisot and First Trust and Savings Bank but of all others in any manner or fashion having or claiming any interest in and to said property."

The relief sought by appellants was in the alternative —that the United States Court suit should remain in *status quo* and that the Trustee in bankruptcy should be directed to appear in the state court suit; or that further proceedings be had in that court without assuming to determine the rights of appellants and subject to such orders as should be made in the State Court respecting the relative rights of the parties (Tr. pp. 132-134).

On September 12, 1916, appellees filed a motion to strike the portions of the answer from which the foregoing statements have been taken; the grounds of the motion were that the matter was irrelevant, redundant, immaterial, sham, and frivolous (Tr. pp. 135-136).

On October 16, 1916, after argument this motion was granted (Tr. pp. 137-140), and subsequently under date of November 16, 1916, an appeal to this court

was allowed by William H. Hunt as a judge thereof.

The question presented by this appeal is: Are the facts stated in the portion of the answer of appellants to which appellees' motion was directed, sufficient to invoke the principles of comity applicable where conflicts of jurisdiction appear?

SPECIFICATIONS OF ERROR.

I.

The District Court erred in making its order or decree of October 16, 1916, as a result whereof there was stricken from the answer of appellants filed in said court and cause under date of September 4, 1916, the portion thereof embraced within paragraph number V and being sub-divided into paragraphs 1, 2, 3, 4, 5 and 6, for the reason that by so doing said court determined contrary to settled law, that such facts as are therein recited fail to disclose a situation requiring the application of principles of comity.

ARGUMENT.

The question presented for decision in this case depends in its final analysis upon whether the institution of such an action as was begun in the state court,—unaccompanied by levy of attachment, physical seizure, or appointment of receiver, but followed by appearance therein of defendants, results in a constructive seizure of the *res*.

As will appear from the transcript and from the statement hereinbefore appearing, the contentions raised in the state court (though not the facts pleaded) by appellants herein were that because of covenants and agreements of the Bitter Root Company there existed in favor of themselves, and all others similarly situated, a lien upon all of the properties of the Bitter Root Company, which lien had been created long before the institution of the action and which lien was prior in right and point of time to that assumed to be created by the trust deed under which appellees were asserting a right to foreclosure in the Federal Court; that funds held by the Bitter Root Company as trustee had been misappropriated and that these funds should in equity be made good from a sale of the assets of the said Company; that a marshalling of the assets of said company was necessary; and that a receiver would have to be apointed by the state court to accomplish these and other results. .It was further asserted by the plea interposed in the District Court of the United States that the Ravalli County State Court had complete jurisdiction in law and equity to determine all these questions; that the property rights and properties involved were the same in each the state and Federal courts; that the Bitter Root Company, appellees and appellants, were the principal parties to each action; that the Bitter Root Company, then in possession of all the properties mentioned, made a general appearance in the state court

suit more than four months prior to the bankruptcy adjudication; that the appellees had made a special appearance more than two months prior to the institution of the Federal court suit, under which appearance the state court had claimed jurisdiction of them for purposes of determining their property rights in the controversy,—also prior to the institution of the Federal court suit; and that there was a *bona fide* intention upon the part of appellants to prosecute the state court litigation to a complete determination of all issues raised therein.

Before passing to a consideration of the matters which really determine the question of the correctness of the ruling of the district court, I call attention to the fact that the motion to strike in this proceeding did not in any fashion, or at all, challenge either the truth of the matters pleaded, nor did it raise any question as to whether the plea was deficient in its statement of facts. The motion only raised the question of whether the matter pleaded was at all material or relevant to the questions raised or to the rights of appellants.

Disposing of what formal objections might be raised,—though they have not heretofore been suggested,—I submit that the interposition in an answer of this form of defense is expressly authorized.

> Rule 29, Rules of Practice for Courts of Equity of United States as promulgated by the Supreme Court of the United States, November 4, 1912.

A recital of the facts set forth in the plea is proper procedure to present the principles upon which appellants relied.

Farmers L. & T. Co. v. *Lake Street E. R. Co.* 177 *U. S.* 51; 44 *L. ed.* 667;

Wabash v. *Adelbert College,* 208 *U. S.* 38; 52 *L. ed.* 379.

Appellants representing a class of litigants having interests in common and of a general character are authorized in each the state court and the Federal court to maintain the action instituted.

"Parties in interest,—when to be joined. When one or more may sue or defend for the whole. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant-the reason therefor being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

Section 6491, *Revised Codes Montana,* 1907.

See also Rule 38 of Rules of Practice, *supra;* and *also Hartford Life Insurance Co. v. Ibs,* 237 *U. S.* 670; 59 *L. ed.* 1165.

The substantial matters requiring consideration are principles of comity applicable in such instances, the effect, if any, of bankruptcy proceedings upon these principles, and the sufficiency of the proceedings in the state court to make for acquisition of such jurisdiction and possession as is requisite to call for the application of the comity doctrine.

I.

THE GENERAL RULE.

The rule is quite recently stated in the case of *Palmer* vs. *State of Texas*, 212 *U. S.* 118, 53 *L. ed.* 435, wherein it is said:

> "If the state court had acquired jurisdiction over the property by the proceedings for the appointment of a receiver and had not lost the same by the subsequent proceedings, then upon well recognized principles, often recognized and enforced by this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovreignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually

as if the property had been entirely removed to the territory of another sovreignty, Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182 and previous cases in this court cited therein at page 54."

Of the cases cited in the *Wabash Railroad Company* decision, we cite and call attention to the following as supporting the rule above announced:

Murphy v. *Hoffman*, 211 *U. S.* 562, 53 *L. ed.* 327;
Farmers L. & T. Co. v. *Lake St. E. R. Co.*, 177 *U. S.* 51, 44 *L. ed.* 667;
Heidretter v. Elizabeth etc. Co., 112 *U. S.* 294, 28 *L. ed.* 729;
Byers v. *McAuley*, 149 *U. S.* 608, 37 *L. ed.* 867.
Pickens v. *Roy*, 187 *U. S.* 177, 47 *L. ed.* 128;
Metcalf v. *Barker*, 187 *U. S.* 165, 47 *L. ed.* 122;
Moran v. *Sturges*, 154 *U. S.* 256, 38 *L. ed.* 981.

In the *Palmer* case, *supra*, it appeared that the receiver appointed by the state court never had taken *actual* possession of the *res;* at once after his appointment an undertaking was given by the defendants in the state court suit which had the effect of suspending the order appointing the receiver. Thereupon an action was commenced in the United States Court, the defendant confessed the allegations of the bill, a receiver was appointed and took possession of the *res*. Later, after appeals taken in the state court suit were decided, the officers of the State of Texas appeared in the United States Court and insisted upon delivery of pos-

session to the receiver named by the state court. The rule of comity was recognized and enforced and the Federal court receiver was compelled to surrender possession to the state court.

The rule as announced by the *Palmer* case, *supra,* is too well established to require further comment. Granted the acquisition of jurisdiction and possession of the *res* by one court, freedom from interference by other courts at once is assured. This rule is subject to only one qualification, viz: Instances where, because of authority conferred by the constitution of the United States, Congress has assumed to declare that the jurisdiction of the Federal courts is exclusive upon the subject.

That the instant case is not within the exception is the next matter for exhibition and determination.

II.

THE BANKRUPTCY PROCEEDINGS.

By sub-division 6 of Section 711, U. S. Revised Statutes as now in force, courts of the United States are given exclusive jurisdiction of "all matters and proceedings in bankruptcy." This provision was enacted in pursuance of the grant of power conferred by the constitution upon Congress to enact uniform laws upon the subject of bankruptcy. But this provision does not mean that no courts but United States courts may determine issues with respect to rights in, and to possession of, property of a bankrupt or claimed

to be a part of his estate. That there is a distinction between "matters and proceedings in bankruptcy" and suits with reference to right to property of a bankrupt is recognized by the provisions of the Bankruptcy Act. See Section 11, sub-division (b); Section 23, sub-divisions (a) and (b); Section 60, sub-division (b); Section 67, sub-division (e); and Section 70, sub-division (e). And this distinction has been recognized by the Supreme Court of the United States at various times since the first enactment of a Bankruptcy law.

Peck v. *Jenness, 7 How.* 612; 12 *L. ed.* 841;
Eyster v. *Gaff,* 91 *U. S.* 521; 23 *L. ed.* 403;
Bardes v. *Bank,* 178 *U. S.* 524; 44 *L. ed.* 1175;
Lovell v. *Newman, 227 U. S.* 412; 57 *L. ed.* 577.

In only one particular has Congress assumed to say that where possession of the *res* has been acquired by a state court, such possession is ousted by the adjudication and this is where, *within four months,* liens have been created by legal proceedings had in such courts. Two elements must be present: the lien must be created by the legal proceedings, *and,* it must be created within four months of the date of adjudication. [Section 67, sub-divisions (c) and (e)]. As has been specifically decided by the United States Supreme Court a "judgment or decree, in enforcement of an otherwise valid pre-existing lien, is not the judgment denounced by the statute, which is plainly confined the judgments *creating liens.*" *(Metcalf* v. *Barker,* 187 *U. S.* 165; 47 *L. ed.* 122).

Hence, it is important to note that the lien asserted by appellants was neither created by legal proceedings, nor was it created within four months of the adjudication with respect to the Bitter Root Company.

As a concurrent jurisdiction is recognized as in the Federal and state courts by sections 11, 23, 60, 67 and 70 of the Bankruptcy Act, and as the lien asserted is not one which is at once dissolved upon the adjudication, I submit, by reference merely to the terms of the act, it is self evident that if the state court acquired jurisdiction by the institution of proceedings in June, 1915, the rule of comity applies in all its force. However, this question has been the subject of decision.

In *Peck* v. *Jenness, supra*, Jenness had acquired a lien by attachment issued out of a state court shortly before adjudication in bankruptcy. After adjudication, the assignee filed a petition in the Federal court reciting that fact and insisting that the state court lien was invalid; the Federal court thereupon decreed the lien to be invalid and made an order directing the sheriff to surrender possession to the assignee. The assignee thereupon appeared in the state court and relied upon the Federal court decree rendered in the bankruptcy matter; a demurrer to this plea was sustained and judgment rendered in favor of Jenness. The judgment being affired was taken to the Supreme Court of the United States for review by writ of error. That court, after assuming the regularity of the bankruptcy proceedings, and determining that the attachment constituted a valid

lien, and admitting that the United States Courts had exclusive jurisdiction "of all suits and proceedings in bankruptcy," decided that the action pending in the state court was not a suit or proceeding in bankruptcy, but that the state court had full and complete jurisdiction, the opinion concluding as follows:

> "It is a doctrine too long established to require citation of authorities that where a court has jurisdiction it has the right to decide every question which occurs in the case, and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every other court; and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in any other court. These rules have their foundation not merely in comity but on necessity. * * * It follows therefore that the District Court had no supervisory control over the state court by injunction or the more summary method pursued in this case unless it has been conferred by the Bankruptcy Act. But we can discover no provision in that act which limits the jurisdiction of the state courts or confers any power upon the bankrupt court to supersede their jurisdiction, or annul or anticipate their judgments or wrest property from the custody of their officers. On the contrary it provides that all suits in law and equity then pending in which such bankrupt is a party may be prosecuted and defended by such assignee to its final conclusion in the same way and with the same effect as they might have been by such bankrupt. Instead of

> drawing the decision of the case into the District Court the act sends the assignee in bankruptcy to the state court where the suit is pending and admits its power to decide the case. It confers no authority upon the District Court to restrain proceedings therein by injunction, much less to take property out of its possession with a strong hand. * * * In fine, we can find no precedent for the proceeding set forth in this plea, and no grant of power to make such a decree or execute it, either in direct terms, or by necessary implication from any of the terms of the bankruptcy act; and we are not at liberty to interpolate it on any supposed grounds of policy or expediency."

While its presence or absence at the time of the rendering of this decision would not be controlling of the instant case, it is interesting to note that the present Section 720, U. S. R. S., was in force at that date in substantially its present language. And the language of the Bankruptcy Act then in force differs not materially from that of the present act in so far as concerns the question here presented.

In *Eyster* v. *Gaff*, *supra*, the Supreme Court attempted to dispel an illusion therefore existing, and seemingly now at times existent, with respect to the effect of an adjudication. Eyster was a tenant under one McClure; Gaff a mortgagee. Prior to the adjudication of McClure as a bankrupt Gaff had instituted in the state court his foreclosure action against the mortgagor, but before decree therein the bank-

ruptcy petition was filed and adjudication made; subsequently schedules were filed showing the Gaff mortgages. Gaff did not come into the bankruptcy proceedings and Eyster defending an ejectment action claimed the state court procedings were ineffective for lack of jurisdiction. The court said:

> "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in a state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court in the case before us had acquired jurisdiction of the parties and of the subject matter of the suit. It was competent to administer full justice and was proceeding, according to the law which governed such a suit, to do so. * * * The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself, by that act, not only all control of the bankrupt's property and credits but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practise to bring any person who contested with the assignee any matter growing out of disputed rights to property or of contracts, into the bankrupt court by the service of a rule to show cause and to dispose of the their rights in a summary way. This court has steadily set its face

against this view. The debtor of a bankrupt or the man who contests the right to real or personal property with him loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred jurisdiction for the benefit of the assignee in the circuit courts and district courts of the United States, it is concurrent with and does not divest that of the state courts."

There is no material difference between the act of 1867 and the present act in so far as concerns the questions here present. The foregoing excerpt from the decision in the *Eyster* case furnishes a complete answer to any suggestion which may be made that adjudication carries with it possession of the *res* to the Federal courts when there are state court actions pending more than four months prior to adjudication and to enforce liens created more than four months before.

The questions presented in the case of *Bardes* v. *Bank*, 178 *U. S.* 524, 44 *L. ed.* 1175, arose with respect to jurisdiction of District Courts of the United States of actions by trustee to recover property alleged to have been transferred contrary to provisions of subdivision e of section 67. This was prior to the amendment of the second sub-divison of section 23, which gave to the United States and state courts concurrent jurisdiction of actions of that character. Both the trustee and the bank were citizens and residents of

the state of Iowa and the District Court was held to be without jurisdiction of the action because of the provisions of sub-division b of section 23, limiting the trustee's right to sue to courts in which the bankrupt might have maintained the action. This case is valuable here as it construes the present bankruptcy act and because by its result it stands as authority against the contention that the jurisdiction of the United States courts is exclusive of all other courts when dealing with property rights of the bankrupt; and in reaching this result the Supreme Court of the United States quotes approvingly the rule announced in Eyster v. Gaff, *supra.*

Metcalf v. Barker, *supra,* furnishes further authority upon the question now being considered. An action was instituted in the state courts by Metcalf Brothers to have certain transfers of property adjudged fraudulent as to them with the object of subjecting that property to judgments recovered by them. After litigation and about the time of final judgment the debtors were adjudged bankrupts; the trustee obtained the issuance of an order to show cause why Metcalf Brothers should not be restrained from enforcing their judgment by resort to the property on the theory that by the adjudication the property became subject to the jurisdiction of the Federal courts. The injunction was issued but the Supreme Court held the interference unwarranted, the applicability of section 720 Revised Codes, U. S., being denied. The Supreme Court in

this action quoted approvingly the language of the decision in *Peck* v. *Jenness, supra,* relative to the principles of comity to be observed.

Pickens v. *Roy,* 187 *U. S.* 177, 47 *L. ed.* 128, is another decision under the present Bankruptcy Act, the Supreme Court therein affirming orders dissolving injunctions temporarily issued out of Federal courts against enforcement of a judgment rendered in a state court suit, instituted prior to adjudication. In affirming the judgment appealed from the Supreme Court expressly approved the conclusion reached by the Circuit Court of Appeals for the Fourth Circuit that the principles of comity applied in bankruptcy cases, and quoted approvingly the language of Goff, J., speaking for the court, that: "The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its details, provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy."

This Court of Appeals has recognized this rule as announced in the Pickens and Metcalf cases, *supra,* (In re Heckman, 140 Fed. 859) and its application to bankruptcy proceedings can be found recognized also in most of the other Circuit Courts of Appeals. I do not cite these decisions as they can add nothing to the effect of those listed herein. But with the present

Bankruptcy Act enacted as it is, and with the decisions rendered and above mentioned, I submit that it is settled beyond chance for dispute that the bankruptcy proceedings can have had no effect upon the general rule of comity as above exhibited.

III.

ACQUISITION OF THE *RES*.

In considering this question it is to be borne in mind that the proceeding in the state court had for its objects the enforcement of a lien upon and against specific property belonging to the Bitter Root Company and the appointment of a receiver to take over those properties and sell the same in satisfaction of the demands of appellants, marshal the assets of the Bitter Root Company, and generally conduct the affairs of that company so as to insure, as far as might be, the performance by the company of its covenants with purchasers of lands and water-rights from it. It is also to be borne in mind that the Bitter Root Company was then in possession of its properties,—the bankruptcy adjudication following over six months thereafter and the Federal court foreclosure and receivership following over eight months thereafter; that the Bitter Root Company made a *general appearance* over four months prior to the adjudication; that a special appearance had been made by appellees and that the state court had declared the existence of its jurisdiction over appellees, so far as concerned an

adjudication of their property rights, before the institution of the Federal court suit and the appointment of its receiver.

Such circumstances are sufficient to vest jurisdiction in a court and establish its possesion of the *res* to the exclusion of other courts.

In the case of *Frazier* v. *S. L. & T. Co., 99 Fed. 707,* (4th C. C. A.) dealing with a suggestion that the rule of comity was not there applicable because there was no actual possession of the property, the court said:

> "Nor is it necessary for a court of equity to take possession of the property in litigation or attempt to do so by the appointment of a receiver where the object of the suit is to set aside a fraudulent conveyance and enforce judgment liens against the land of the debtor. If proceedings have been commenced more than four months before the adjudication in bankruptcy the jurisdiction of the state court cannot be divested by the bankrupt court. This was the case of Kimberling v. Hartly, 1 Fed. 571, and the court held: 'Where an action is pending in a state court of competent jurisdiction to enforce a specific lien upon the property of a debtor the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the case *and execute the same.*'"

In *Mound City Co.* v. *Castleman et al.,* 187 *Fed.* 921 (8th C. C. A.) the facts pertinent to the question here being considered are: An action in partition was filed in a state court of Missouri against persons claim-

ing interests in land; summons was issued and served upon Ben T. Castleman *after* he had sold his interest in the land to the Mound City Co., and this company thereafter instituted an action in the Federal court to obtain substantially the same relief. Error was claimed by the Mound City Company with respect to the action of the Federal court in dismissing its bill. The Circuit Court of Appeals after announcing the general rule of comity and the rule that jurisdiction once attaching the court has the right to enforce its decree and protect titles taken thereunder, said:

> "The fact clearly appeared from the petition as soon as it was filed in the state court that it would be necesary to a complete determination of the issues tendered, and to the enforcement of the decree sought, for that court to exercise its dominion over the specific land described in the petition and to divide or sell it. The *commencement of that suit*, therefore, withdrew that land from the jurisdiction of the Federal court below and from the jurisdiction of every other court, so far as necessary to give effect to the final decision and decree in the state court and gave to that court the power to retain the control over it requisite to protect the titles of those who should hold under its decree.
>
> "Although the summons in the suit in the state court was not issued until March 25, 1907, and was not served until May 13, 1907, yet the former suit was commenced and *the state court acquired the legal custody of the land on March* 20, 1907, *when the petition in that suit was filed.* A suit is commenced by the filing of the petition or bill

with the honest intention to prosecute the suit diligently provided there is no detrimental or unreasonable delay in the subsequent issue or service of process. (Citing cases.)"

As is apparent from this last decision there was not present the element of possession by the Federal court receivers such as is disclosed in the instant case: but the same Circuit Court of Appeals in *McKinney et al.*, v. *Landon et al., 209 Fed.* 300 considered this question again and had before it a state of facts which is strikingly similar to those brought before this court by this appeal.

In January of 1912 an action was commenced at the instance of the State of Kansas in a state court against the Kansas Natural Gas Company and another corporation, claiming unlawful combinations and violations of the anti-trust statutes; and in which action it was sought to revoke the charters of these corporations. The appointment of a receiver was sought to take charge and dispose of their properties. *No receiver was appointed:* the action was tried September 30 and October 1, 1912 and taken under advisement. On October 7, 1912 a foreclosure bill and creditors' action was begun in the United States Court for the District of Kansas and in this proceeding the Kansas Natural Gas Company, made defendant, confessed the allegations of the bill and receivers were appointed who thereafter took possession of the properties of the Kansas Natural Gas Company. February 13, 1913 the action in the state court was decided against the cor-

porations; receivers were appointed and were directed to go into the Federal court to assert the prior right of the state court to the properties and obtain the surrender thereof to themselves as officers of that court. Prior to this time there had been no assertion of the rights to possession resulting from the institution of the state court suit. In determining that the possession of the Federal court receivers must be abandoned to the state court receivers, the court said:

> "*The action in the state court was begun first,* but *the federal court first appointed receivers.* Did the subsequent appointment of receivers by the state court relate back so that it may be said that it was in constructive possession of the property from the time the action was commenced? It is a maxim of the law that a court having possession of property cannot be deprived thereof until its jurisdiction is surrendered or exhausted, and that no other court has a right to interfere. *It is a principle of right and of law which leaves nothing to the discretion of another court and may not be varied to suit the convenience of litigants.* Merritt v. American Steel Barge Co. 24 C. C. A. 530, 79 Fed. 228. It is essential to the dignity and authority of every judicial tribunal and is especially valuable for the prevention of unseemly conflicts between federal courts and the courts of the states. As between them it is reciprocally operative,—mutually protective and prohibitive. The most difficulty arises in determining when possession of property has been taken, when jurisdiction has attached to the exclusion or postponement of

that of other courts. *It is settled, however, that actual seizure or posession is not essential,* but that jurisdiction may be acquired by acts which, acording to established procedure, stand for dominion *and in effect subject the property to judicial control.* It may be by the mere commencement of an action the object or one of the objects of which is to control, affect, or direct its disposition. See Mound City Co. v. Castleman, 110 C. C. A. 55, 187 Fed. 921, and the cases cited. The principle often applies 'where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.' Farmers Loan and Trust Co. v. Railroad, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. * * * But where the declared purpose of an action in whole or in part is directed to specific property, and the full accomplishment thereof may require judicial dominion and control, jurisdiction of the property attaches at the beginning of the action. And it is so if dominion and control are essential to the action, though not yet exercised. We think enough has been said of the nature of the action in the state court to show that it is within the principle invoked. Judicial dominion of the combined and commingled properties of the offending corporations is vitally necessary to the purposes of the action. In no other way could the marshalling and separation be effectually accomplished."

That this has long been recognized by the United States Supreme Court as the true rule is disclosed by the decision in the case of *Heidretter* v. *Elizabeth Oil Cloth Co.*, 112 *U. S.* 294, 28 *L. ed.* 729. The court had before it for consideration two questions, viz: did the institution of an action to enforce a lien, coupled with constructive service of process, vest such a court with jurisdiction to determine rights thereto; and, present parties claiming under deeds given under decrees from state and Federal courts, the effect of principles of comity upon such asserted rights to possession. The court first determined that jurisdiction was acquired in the manner indicated, quoting from *Pennoyer* v. *Neff*, 95 *U. S.* 714, 24 L. ed. 565 to the effect jurisdiction attaches "where property is once brought under the control of the court by seizure or *some equivalent act*"; from *Cooper* v. *Reynolds*, 10 *Wall.* 308, 19 *L. ed.* 931, that "while the general rule in regard to jurisdiction in *rem* requires an actual seizure and possession of the *res* by an officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing and *in effect subject it to the control of the court*"; from *Boswell* v. *Otis*, 9 *How.* 336, that "It is immaterial whether the proceeding against the property be by attachment or bill in chancery. It must be substantially a proceeding *in rem*"; and announcing as its own conclusion:

> "But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceeding was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but *may be done by the mere bringing of the suit in which the claim is sought to be enforced*, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

In this *Heidretter* case, it appearing that the property had been in the possession of an officer of the Federal court prior to the institution of the state court suit, it was held, upon principles of comity that the litigant claiming under Federal court decree was entitled to possession.

In the case of *Farmers L. & T. Co.* v. *Lake St. E. R. Co.*, 177 *U. S.* 51, 44 *L. ed.* 667 there was no actual seizure of the *res* by any officer of the United States court before action was commenced in the state court and the injunction issued out of that court: but the Supreme Court upheld the jurisdiction of the Federal court, saying:

> "The possesion of the *res* vests the court which has first acquired jurisdiction with power to hear and determine all controversies relating thereto and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power.

> This rule is essential to the orderly administration of justice and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before the second suit is instituted in another court, *but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets,* administer trusts, or liquidate insolvent estate and in suits of a similar nature *where, in the progress of the litigation, the court may be compelled to assume the possession and control of of the property to be affected.* The rule has been declared to be of especial importance in its application to Federal and state courts." (Citing cases.) "We think that this salutary rule is applicable to the present case."

The above language is quoted approvingly in the case of *Palmer* v. *State of Texas, supra,* in which instance there had been no actual possession of the *res* by any officer of the state court, but in which case the United States Supreme Court held that the order of the Federal District Court in appointing a receiver was erroneous, that the possession of the Federal court receiver could not be maintained and that the state court receiver was entitled to possesstion.

That the state court had, under the laws of Montana, jurisdiction of the *res* and the parties is clearly made to appear in the case of *State ex rel Mackey* v. *Dis-*

trict Court, 40 *Mont.* 359, 106 *Pac.* 1098 and *Gassert* v. *Strong,* 38 *Mont.* 18, 98 *Pac.* 497, in which latter case are quoted approvingly extracts from *Boswell* v. *Otis, supra, Pennoyer* v. *Neff, supra,* and *Heidretter* v. *Oil Cloth Co., supra.*

Again I call attention to the fact that as far as appellees are concerned it appears that they had actual notice of the pendency of the state court proceedings and of its assertion of its jurisdiction over this property: they were parties to the action and had made a special appearance therein which had been overruled. Also I again call attention to the fact that the bankrupt had more than four months prior to adjudication entered a *general* appearance in the state court suit, thereby subjecting itself and its property, then in its possession, to such orders and decrees as should emenate from the state court. The rights of the trustee, under the circumstances, could, of course, be no greater than those of the bankrupt. (Sec. 70 Bankruptcy Act).

I submit, upon the facts presented by appellants' plea filed in the District Court, and in view of the foregoing authorities, that the jurisdiction of the state court and its possession of the *res* had attached more than four months prior to the bankruptcy adjudication, prior also to the institution of the action in the Federal Court, and that if these matters shall be established upon further proceedings in the District Court appellants will be entitled to relief in one or the other of the forms sought.

Having finished my presentation of the questions raised by this appeal, I will briefly, and in conclusion consider the memorandum opinion filed by Bourquin, District Judge.

He states that "of some of the matters involved herein the state court has no jurisdiction, exclusive jurisdiction thereof being in this court, finding origin in the constitutional provisions for bankruptcy."

"These latter cannot be fully adjusted without adjustment of those asserted in the state court, and *it makes for convenience, speed and justice to have the whole dealt with by one court. The rule of comity yields thereto.*" If ever a statement was made contrary to established precedent, this is one. As above shown the Supreme Court of the United States has many times expressly affirmed the applicability of the rule of comity where jurisdiction was claimed because of subsequent bankruptcy proceedings; and as early as *Peck v. Jenness, 7 How.* 611, 12 *L. Ed.* 841, the Supreme Court of the United States squarely ruled against such a construction of the Bankruptcy Act, saying: "In fine, we can find no precedent for the proceeding set forth in this plea and no grant of power to make such a decree or execute it, either in direct terms or by necessary implication from any of the provisions of the Bankruptcy Act; and, we *are not at liberty to interpolate it on any supposed grounds of policy or expediency.*"

The District Judge refers to *Moran v. Sturges*, 154 *U. S.* 284, 38 *L. Ed.* 981, as controlling of the decision.

In the earlier portions of this brief it was conceded that the rule of comity did not apply where the jurisdiction of the courts was not concurrent. It will be observed from an examination of the opinion in the *Moran* case that there was at all times in contemplation by the state court litigants the question of determination of their rights as compared with those asserted under *maritime liens,* and the injunction of which complaint was made, was against the libelants proceeding in the United States courts. It is made definitely certain and clear by the decision in that case that the only reason for denying the application of principles of comity—otherwise proper because of the prior institution of the state court litigation—was that the state court *was entirely without authority* to adjudicate with reference to maritime liens, *exclusive* jurisdiction with respect thereto being in the Federal Courts. The United States Marshal was in actual possession of the boats, right to possession being asserted because of the existence of maritime liens. As the state court could not adjudicate with reference to those liens, it was held improper for that court to attempt to restrain libelants from proceeding in the only court which had jurisdiction.

How different is the situation here, where state courts are expressly recognized as having *concurrent* jurisdiction with the Federal courts respecting the determination of liens of the character being asserted by the parties to this proceeding.

Murphy v. Hoffman, 211 *U. S.* 568, 53 *L. Ed.* 327 cited by the District Judge was a matter wherein the possession of the court of bankruptcy had *first* attended.

Neither the *Moran* nor the *Hoffman* case is at all in conflict with the cases cited in this brief respecting the effect of bankruptcy upon this action. They are many times cited, however, as announcing the general comity rule.

Wabash Ry. Co. v. Adelbert College, supra, is also cited, the District Judge commenting upon the fact that the suit in the state court had been commenced before the Federal Court suit was instituted and possession taken by its receivers. But as has been before exhibited, the decision hinged upon the continuing effect of the Federal Court decree of March 23, 1889; and no claim was advanced, or considered, that the jurisdiction of the state court was superior because litigation was first begun therein. The contention advanced in that case was that the Federal Court had relinquished jurisdiction of the *res* by the decree of March 23, 1889.

Metcalf v. Baker, supra, also cited by the District Judge, has been herein considered and clearly does not support the decision from which the appeal is taken.

Concluding, I contend that the matter stricken from appellants' answer was vitally material to their substantial rights; that they are entitled to a determination of the truth of those statements by hearing before trial of the principal case; and that if these statements are correct, appellants are entitled to the relief sought.

Respectfully submitted,

R. F. GAINES,
Attorney and of Counsel for Appellants.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 2878

HANS B. KNUDSEN and CAROLINE KNUDSEN, *Appellants,* **vs.** **FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,** *Appellees.*	On Appeal from the United States District Court for the District of Montana.

BRIEF FOR APPELLEES.

WINSTON, PAYNE, STRAWN & SHAW,
HENRY C. STIFF,
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CUNDORF-WARREN PRINTING COMPANY, CHICAGO.

IN THE

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No. 2878

HANS B. KNUDSEN and CAROLINE KNUDSEN, *Appellants,* *vs.* **FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,** *Appellees.*	On Appeal from the United States District Court for the District of Montana.

BRIEF FOR APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Statement of Case.

On June 24, 1915, the appellants commenced, in the District Court of the Fourth Judicial District of the State of Montana in and for the County of Ravelli, suit against the Bitter Root Valley Irrigation Company, hereafter referred to as the "Irrigation Company," to which appellees were made parties, setting forth certain alleged facts which it was claimed created a trust fund in

the property of the Irrigation Company and a lien upon its property prior to the lien of the mortgage of the appellees. To secure the enforcement of the lien and to complete the irrigation system it was requested that a receiver be appointed of the properties and assets of the Irrigation Company. The Irrigation Company appeared generally to said suit, the appellees appeared specially, and their special appearance was later overruled.

On January 1, 1916 (Rec., 103) the Irrigation Company defaulted on its mortgage to the appellees. On January 3, 1916, the Irrigation Company filed its voluntary petition in bankruptcy and on February 23, 1916, F. C. Webster was appointed Trustee in Bankruptcy, was duly qualified, took possession of all the property of the Irrigation Company and is now acting as such trustee. (Rec., 106.)

After the bankruptcy of the Irrigation Company the situation became desperate. (Rec., 107.) The company had planted 3,000 acres with apples and cherries which had been under cultivation for four or five years and on which the company had expended more than $300,000. The trees were just reaching bearing. Unless the trees should be taken care of and irrigated during the season the trees would die, this expenditure would be lost, and the security in which both the appellants and appellees are interested greatly and irreparably depreciated. It was part of the Irrigation Company's business to maintain an irrigation system and deliver water to settlers in the Bitter Root Valley. Failure to make this delivery would greatly and irreparably damage the property of the settlers and depreciate the value of other security of the appellees. (Rec., 108.) The immediate and continued operation and maintenance of the irrigation system of the Irrigation Company and the prompt delivery of water to settlers in the Bitter Root Valley was a mat-

ter of great public necessity. Failure of the irrigation system would bring irreparable loss and injury, not only to the property mortgaged to appellees, but to the property of many other innocent people, settlers in the Bitter Root Valley and dependent upon the irrigation system for a supply of water and the very existence of their farms and orchards. Failure to deliver this water when required would be a great disaster to Ravelli County and to the State of Montana. It then further appeared (Rec., 109) that the value of all the property subject to the lien of the mortgage of the appellees was far less than the face amount of the bonds due thereunder; that excepting certain personal property of little or no value there was no property in the hands of F. C. Webster as trustee in bankruptcy not subject to the appellee's mortgage; that F. C. Webster as such trustee therefore had no interest in putting the irrigation system in condition to deliver water or in operating or maintaining the same or in taking care of and irrigating the orchards of the Irrigation Company; that he was without funds or means of placing the irrigation system in condition to deliver water in the spring of 1916 or to maintain and operate the same; and that he was entirely without credit to borrow money for the purpose of putting the irrigation system in condition or of operating or maintaining the same or of taking care of or irrigating the orchards of the Irrigation Company. Appellees therefore obtain the consent of the Federal Court to the commencement of foreclosure proceedings and under the express power granted to the appellees in their mortgage obtained the appointment of a receiver of all of the property of the Irrigation Company. This bill was filed April 8, 1916, and F. C. Webster, Trustee in Bankruptcy, was appointed and duly qualified as the receiver of the United States District Court in the foreclosure

suit of the appellees and as such took possession of all the property of the company.

The appellees made the appellants parties to their bill of foreclosure (Rec., 106) because they claimed some interest in the mortgaged property or some part thereof. The appellants filed their answer setting up the pendency of their proceeding in the State Court and prayed (1) a stay of the foreclosure suit in the Federal Court, or (2) that the foreclosure suit proceed only with reference to the Irrigation Company and F. C. Webster, Trustee in Bankruptcy, but not with reference to any other defendants, and with the express reservation that the determination of the rights of the appellees with respect to the Irrigation Company and F. C. Webster should be subject and subordinate to any orders hereinafter made by the State Court with reference either to the appellees, the Irrigation Company, F. C. Webster as Trustee or *to the property and assets* of said Irrigation Company, and with the further reservation that the *possession* of the receiver of the Federal Court should be subordinate to any orders of the State Court with reference to the property and assets of the Irrigation Company. Motion to strike the portions of the answer referring to the proceeding in the State Court and the prayers just referred to was made by the appellees and allowed by the District Court.

The answer filed by the appellants in the foreclosure suit does *not* show (1) that a receiver was requested in the State Court for the purpose of operating and maintaining the property; (2) that any motion for the appointment of a receiver in the State Court has been made; (3) that any objection was made by the appellants to the appointment of F. C. Webster as Trustee in Bankruptcy and his taking possession of all of the property of the Irrigation Company; (4) that the proceeding in the State

Court, begun June 24, 1915, has been brought to issue up to the time of the filing of the answer in the foreclosure suit, September 4, 1916, or that any attempt is being made to prosecute the said suit in the State Court with effect; (5) that the irrigation system and the property of the Irrigation Company can be maintained and operated for the protection of the security and of the public in any way under the issues involved in the suit in the State Court; (6) that a decree of foreclosure of the appellees' mortgage can be obtained *in invitum* in the suit in the State Court (the allegations of the answer (Rec., 130-131) are merely conclusions), or (7) that the parties defendant, other than the appellants named in the foreclosure suit, have claims similar to the appellants.

BRIEF.

I.

THE PRIOR PENDENCY OF THE ACTION OF THE APPELLANTS IN THE STATE COURT IS NO BAR TO THE PROSECUTION OF THE APPELLEES' ACTION IN THE FEDERAL COURT.

Gordon v. *Gilfoil*, 99 U. S., 168.
McClellan v. *Carland*, 217 U. S., 268.
Hunt v. *New York Cotton Exchange*, 205 U. S., 322.
Land v. *Ferro Concrete Construction Co.*, 221 Fed., 433.
Brown v. *U. S.*, 233 Fed., 353.
Stanton v. *Embry*, 93 U. S., 548.

II.

WHERE THE ACTIONS ARE NOT IDENTICAL, AND WHERE THE STATE COURT IN THE PRIOR SUIT HAS NOT POSSESSION OF THE PROPERTY, THE PENDENCY OF PRIOR LITIGATION IN THE STATE COURT WILL NOT DEPRIVE THE FEDERAL COURT, IN PEACEFUL POSSESSION OF THE *res*, OF ITS JURISDICTION TO DISPOSE OF ALL MATTERS PROPERLY BEFORE IT.

Empire Trust Co. v. *Brooks*, 232 Fed., 641.
Moran v. *Sturges*, 154 U. S., 256.
Griswold v. *Central Vermont R. Co.*, 9 Fed., 797.
Edwards v. *Hill*, 59 Fed., 723.
East Tenn. R. R. Co. v. *Atlanta R. R. Co.*, 49 Fed., 608.
Compton v. *Jesup*, 68 Fed., 263.
Roger v. *J. B. Levert Co.*, 237 Fed., 737.

ARGUMENT.

The issue in the suit in the Federal Court is the foreclosure of the mortgage of the appellees involving the determination of certain claims of various individuals, including the appellants and others. Incidental to the foreclosure suit is the operation of the property and the maintenance of the security covered by the mortgage.

At the time the Federal Court appointed F. C. Webster, Trustee in Bankruptcy, and he took possession of all the property of the Irrigation Company, at the time the Federal Court appointed the same F. C. Webster receiver in the foreclosure suit of all of the property of the Irrigation Company subject to the appellees' mortgage and up until the present time the issues in the case in the State Court do not require, the appellants have not asked, and the State Court has not appointed a receiver of the *res*. The State Court has therefore neither actual nor constructive possession of the *res*.

The appellants asked for alternative relief, either (1) a stay of all proceedings in the Federal Court, or (2) that the proceedings may continue in the Federal Court but no rights of the appellants shall be affected thereby and that the State Court shall have sole control of the *res*. The question on this appeal is: Must the Federal Court surrender its jurisdiction over the *res*, even though no actual or constructive possession has been taken of the *res* in the State proceeding, no possession now asked and no possession may ever be taken, simply because a suit involving different issues but the same property was first started in the State Court?

I.

Little attention has been paid by the appellants in their brief, to the stay of all proceedings in the Federal Court. This for the obvious reason that it is settled law the pendency of a case in the State Courts is no bar to the prosecution of the same case in the Federal Courts.

In *Gordon* v. *Gilfoil,* 99 U. S., 168, an action was started in the State Courts on promissory notes and a mortgage securing the same. Judgment was rendered for the defendants because the seizure and sale by the sheriff was void. Thereupon the plaintiff started a suit in the United States court, on his notes and mortgages. The defendant claimed that plaintiff was barred because executory proceedings in the State Court were still pending. It was held that the pendency of a suit in the state court did not abate a suit upon the same cause of action in the Federal Court. Mr. Justice Bradley delivered the opinion of the court and said, page 178:

> "It may be proper here also to observe, although the point was not pressed in the argument, that the exception to the jurisdiction of the Circuit Court is destitute of foundation. The suggestion was, that, as the proceedings in the order of seizure and sale were still pending in the District Court, the debt could not be prosecuted in the Circuit Court of the United States. But it has been frequently held that the pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a Federal Court. What effect the bringing of this suit, *via ordinaria,* may have had on the order of seizure and sale, it is not necessary to determine. It is possible that it superseded it. But the pendency of that proceeding, when the suit was commenced, can not affect the validity of the proceedings in this suit, nor the jurisdiction of the court in respect thereof."

McClellan v. *Carland,* 217 U. S., 268. A petition for mandamus was filed in the Circuit Court of Appeals for the Eighth Circuit to compel a District Judge to set aside certain orders entered in a suit staying the proceedings until the determination of a suit to be started by the State of South Dakota covering property in the hands of an administrator, which property had been in controversy in various suits in the South Dakota courts. Mandamus was denied in the Circuit Court of Appeals, and on writ of certiorari the Supreme Court reversed this finding. Mr. Justice Day, delivering the opinion of the court said on page 282:

> "The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case. In the present case, so far as the record before the Circuit Court of Appeals discloses, the Circuit Court of the United States had acquired jurisdiction, the issues were made up, and when the state intervened the Federal court practically turned the case over for determination to the state court. We think it had no authority to do this, and that the Circuit Court of Appeals, upon the record before it, should have issued the writ of mandamus to require the judge of the Circuit Court of the United States to show cause why he did not proceed to hear and determine the case."

In *Hunt* v. *New York Cotton Exchange,* 205 U. S., 322, a bill in equity was brought by plaintiff against Hunt to enjoin him from receiving and using the quotations of sales made upon the cotton exchange. An injunction had been issued against a telegraph company in the State Court restraining it from refusing to supply quotations

to defendant, and it was urged that the pendency of this suit was a bar to the suit in the Federal Court. The court held that the pendency of a suit in the State Court does not deprive a Federal Court of jurisdiction. Citing *Gordon v. Gilfoil, supra; Insurance Company v. Brunes, Assignee*, 96 U. S., 588; *Stanton et al. v. Embry*, 93 U. S., 548.

Land v. Ferro Concrete Construction Co., 221 Fed., 433. Two suits were started on the same day on the same contract in the State Court. One of these suits was removed to the Federal Court, whereupon the other State Court suit was pleaded in bar.

The court held the general rule to be that even if the causes of action set up in the two suits are identical, the pendency of a suit in the State Court does not abate an action in the Federal Court.

Brown v. U. S., 233 Fed., 353. In a criminal suit in the Federal Court, where it was sought to prevent a person from testifying on account of a conviction in the State Court the court said, page 357:

> "A similar line of cases exists asserting the independence of the federal judiciary in its jurisdiction of civil causes of action. We need not cite other than Supreme Court cases, *Stanton v. Embry*, 93 U. S., 548, 23 L. Ed., 983; *Gordon v. Gilfoil*, 99 U. S., 168, 25 L. Ed., 383, and *Hunt v. New York Cotton Exchange*, 205 U. S., 322, 27 Sup. Ct., 529, 51 L. Ed., 821, all to the point that the pendency of a prior suit in a state court is not the ground of abatement of an action on the same state of facts between the same parties in the federal court, or vice versa, the decisions turning on the principle that the two courts are foreign as the creatures of different governments. The language of these decisions leaves no room for the feeling that any interdependence exists between a state and the Federal government which affects the identification of either as a sovereignty entirely apart from the other."

Stanton v. *Embry*, 93 U. S., 548. Mr. Justice Clifford, delivering the opinion of the court, said (554):

> "It is insisted by the defendant in error that the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in the circuit court or the court below, even though the two suits are for the same cause of action, and the court here concurs in that proposition.
>
> Repeated attempts to maintain the negative of that proposition have been made, and it must be admitted that such attempts have been successful in a few jurisdictions, but the great weight of authority is the other way."

There can be no doubt from the foregoing decisions that the appellants are not entitled to the first of the alternative reliefs prayed and there can be no stay of the proceedings in the Federal Court.

II.

We come now to the question of sole control of the *res* between the State and Federal Courts.

The suit in the State Court was started in January, 1915. In February, 1916, Webster as trustee in bankruptcy, took peaceful possession of the *res*. In April, 1916, Webster was appointed receiver and took possession of the *res* in the foreclosure suit in the Federal Court. The *res* had never been in the actual possession of the State Court, nor has the State Court ever attempted or been asked to obtain actual or constructive possession of the *res*. There is, therefore, in this case no actual or constructive possession of the *res* by the State Court, and the Federal Court is in peaceable possession of the *res*, maintaining and operating the property. The claim, however, is made that although the State Court has neither actual nor constructive possession of the *res*,

nevertheless it is essential that the Federal Court should refrain from exercising any control over the *res* because the State Court first acquired jurisdiction of the parties, and in the final disposition of the litigation there there is a possibility that it might become necessary for the State Court to exercise its jurisdiction over the *res*. In other words, has the jurisdiction of the State Court become exclusive?

The distinction between cases where as a matter of right the State Court should have exclusive jurisdiction, and where the question is one of comity and depending upon the identity of the actions, is best stated in a recent case in the Court of Appeals of the Fifth Circuit.

> "It seems clear that where the basis of the rule is an infringement of the jurisdiction of the court, and not an interference with its possession of property, the rule depends upon the existence of such a conflict and is not absolute. The quoted language of the Supreme Court indicates that the rule, where there is no disturbance of possession, is one of limited and not of universal application. It is a rule of comity, to be applied by the court asked to surrender its possession, only when it is shown that that court has interfered with the jurisdiction of the court asking the surrender. It was held to be merely a rule of comity by this court in the case of *Adams* v. *Mercantile Trust Co.*, 66 Fed., 617, 15 C. C. A., 1; a case in which there was a clear conflict of jurisdiction. Where the issues in the two suits are the same, and their subject matter substantially identical, comity and the orderly administration of justice, and the desire to avoid a conflict of jurisdiction, require of the court that last acquires jurisdiction, though it be the first to acquire possession of the property involved in the litigation, that it surrender such possession, on application, to the court of concurrent jurisdiction which first acquired jurisdiction of the controversy. This was the holding in *Palmer* v. *Texas*, 212 U. S., 118, 29 Sup. Ct., 230, 53 L. Ed., 435; *Farmers' Loan Co.* v. *Lake Street Ry. Co.*, 177 U. S.,

51, 20 Sup. Ct., 564, 44 L. Ed., 667; *Adams* v. *Mercantile Trust Co.*, 66 Fed., 617, 15 C. C. A., 1. In such cases the court making the surrender abdicates its jurisdiction over the cause, as well as surrenders possession of the *res*.

However, where the issues in the subsequent suit are different from those involved in the first suit, and the subject matter is not identical, there can be no infringment of the jurisdiction of the court in which the first suit is pending, by reason of the institution of the second suit in a court of concurrent jurisdiction."

Empire Trust Co. v. *Brooks*, 232 Fed. Rep., 641, at p. 645.

It is clear that there is no identity between the appellees' foreclosure suit in the Federal Court and the appellants' litigation in the State Court. The one is a suit for foreclosure of a mortgage, the other for the completion of the construction of the irrigation system and for the establishment of a trust fund. A successful termination in the Federal Court would involve the sale of the property as it is. A like termination of the state case would involve the new construction of the irrigation system. In one case there is sought to be enforced a mortgage lien, in the other case a resulting trust. There are parties to the foreclosure suit who are not involved in the state case. The case in the Federal Court requires the operation and maintenance of the *res*. In the State Court there is no question of operation and maintenance. Since, therefore, the appellants' suit in the State Court and the appellees' foreclosure suit are not identical, the Federal Court first obtained possession and it should be permitted to dispose of all questions.

Empire Trust Co. v. *Brooks*, *supra*, is on all fours with the present case. In that case suit had been brought in the State Courts of Texas for the appointment of a re-

ceiver and the winding up of a corporation. A subsequent suit was brought in the Federal Courts for the appointment of a receiver and the foreclosure of a mortgage. The Federal receiver was first appointed and took possession. Subsequently a receiver was appointed in the State Courts and demanded possession of the *res* in the hands of the Federal receiver. The court held that comity did not require the delivery of the *res* to the state receiver, since the two suits were not identical except so far as they related to the same property. This case goes even further than our case, for the reason that here the State Court has not appointed a receiver and no motion for such appointment has ever been made by the appellants.

A case in point is *Moran* v. *Sturges*, 154 U. S., 256. In that case a petition was filed in the State Courts for the dissolution of the corporation and for the appointment of a receiver. The receiver was appointed but had not qualified before the United States Marshal seized the *res* under a libel in admiralty. The court said (283):

> "The contention is not only that the title to these vessels vested in the receiver as of July 31, and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the District Court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of relation has no application. As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in

dispute. But where the jurisdiction is not concurrent and the subject matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and under these state statutes, is adopted to defeat fraudulent, unwarranted and unjust disposition of the debtor's property, and to accomplish just and equitable ends. *Herring* v. *N. Y. Lake Erie &c. Railroad*, 105 N. Y., 340, 377.

At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

The jurisdiction of the state court over the subject matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libellants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31, as mere creditors of that Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over which that court could not exercise jurisdiction *in invitum*, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the District Court could not obtain jurisdiction for the

purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels."

The Trustee in bankruptcy and the receiver of the Federal Court is in actual possession. The rights of creditors and the distribution of the bankrupt estate can only be determined in the proceeding in the Federal Court. Nor *in invitum* can the appellees be compelled to try their foreclosure suit in proceedings in the State Court, but a mortgagee has the right to select his own forum.

"It is, however, well settled that the fact that property is being administered upon in state proceedings does not prevent citizens of other states from proceeding in the Circuit Courts of the United States to establish their claims and obtain relief if entitled to it." *Griswold* v. *Central Vermont R. Co.,* 9 Fed., 797, at p. 799.

"We are not cited to any provision of the Kansas statute which purports to deny to the holder of a mortgage on real estate the right to bring suit for its foreclosure in any court of competent jurisdiction; but, if the state denied such right to its own citizens, the denial would not affect the right of a citizen of another state to bring a bill to foreclose his mortgage in the circuit court of the United States." *Edwards* v. *Hill,* 59 Fed., 723, at p. 725.

Section 6501 of the Revised Code of Montana (1907) provides

"Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated * * *

3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action."

The case of the appellants is pending in Ravelli County, Montana. Some of the property of the Irrigation Company is located in Missoula County, and the appellees therefore, if they elected to go into a State Court at all would have the absolute right to begin their action in Missoula County. *In invitum,* therefore, the Ravelli County Court could not exercise jurisdiction over the foreclosure of the appellee's mortgage and the present case is brought squarely within *Moran* v. *Sturges, supra.*

In *East Tenn. R. R. Co.* v. *Atlanta R. R. Co.*, 49 Fed., 608, a bill had been filed in the State Court asking the appointment of a receiver. Later a similar bill was filed in the Federal Court and a receiver appointed. Immediately thereafter a receiver was appointed in the case pending in the State Court. In affirming the jurisdiction of the Federal Court, the court said (610):

> "Nor does the mere pendency of the bill in the state court in itself deny to this court the power of appointing a receiver where it has jurisdiction of the parties, and where its action is otherwise proper. Nor will such pendency affect the title of the receiver of this court. The title of a receiver, on his appointment, dates back to the time of granting the order. Beach, Rec., par. 200. In cases of conflicting appointments, the courts will inquire into the priority of appointment, and, if necessary, will take into consideration fractions of the day. Id., 232. While courts of equity have insisted upon the doctrine of *lis pendens*, they have found it difficult, and often inequitable to enforce it. Id., 200. The rule upon that subject in this state is deducible from the decision of the supreme court in *Bank* v. *Trustees*, 63 Ga., 552, where the court (Jackson, Justice, delivering the opinion) uses this language:
>
> 'But it would seem here that the stockholders' bill has been pending here for a long time in the circuit court of the United States, and no receiver is yet appointed. Perhaps none ever will be. Is the judgment creditor to wait until one is to be appointed?

He is not even in this case made a party to the bill in the United States court. If he were, and if the bill there filed was similar to this in review here, and could accomplish the same end, to wit, the collection of this debt by the judgment creditor, having the final process of the state court in his hands, even then we should rule that neither law nor equity nor comity would require the equity court to wait upon the United States court in a case like this.'

The application of that decision is that neither law, equity, nor comity will require the United States court to wait upon the state court in a case like this.

In a very carefully considered case, Mr. Justice Bradley, while presiding in this circuit, gave a controlling definition of the law. In *Wilmer* v. *Railroad Co.*, 2 Woods, 426, the learned justice used this language:

'This test, I think, is this: not which action was first commenced, nor which cause of action has priority or superiority, but which court *first acquired jurisdiction over the property.* If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court. The parties must either go to that court, and pray for the removal of its hand, or, having procured an adjudication of their rights in this court, must wait till the action of that court has been brought to a close, and judicial possession has ceased. Service of process gives jurisdiction over the person,—seizure gives jurisdiction over the property; and, until it is seized, no matter when the suit was commenced, the court does not have jurisdiction.'

In this holding the Honorable John Erskine, the judge of this district, now retired, concurred, and in its support Justice Bradley cites many authorities, which he states have been 'somewhat carefully consulted.' In addition to these it will be instructive to refer to *Barton* v. *Keys*, 1 Flip., 61; *Levi* v. *Insurance Co.*, 1 Fed. Rep., 206; *Walker* v. *Flint*, 7 Fed. Rep., 437; *Erwin* v. *Lowry*, 7 How., 172; *Gris-*

wold v. *Railroad Co.*, 9 Fed. Rep., 797; *Covell* v. *Heyman*, 111 U. S., 176, 4 Sup. Ct. Rep., 355; *Heidritter* v. *Oil-Cloth Co.*, 112 U. S., 294, 5 Sup. Ct. Rep., 135."

In *Compton* v. *Jesup*, 68 Fed., 263, Circuit Court of Appeals of the Sixth Circuit, Taft, Lurton and Ricks, Judges: Judge Taft, in disposing of the objection to the Federal Court's taking possession of property under a foreclosure suit where there was a suit pending in the State Court to establish a lien, said (283):

> "It is further objected that the court below had no power to take possession of the railroad property by its receivers in 1884, pending the suit of Compton, in the common pleas court, to subject the property to the payment of his liens. The argument is that Compton's suit was in the nature of a proceeding *in rem*, which impounded the property, and excluded any other court from assuming actual possession of it. *Heidritter* v. *Oil-Cloth Co.*, 112 U. S., 294, 5 Sup. Ct., 135, is cited in support of this proposition.—That was an ejectment suit. The plaintiff claimed under a sheriff's deed executed to a purchaser at a judicial sale by order of a state court, in a proceeding to enforce a mechanic's lien against the premises in controversy. The defendant claimed under a marshal's deed executed to the purchaser at a judicial sale by order of a federal court, in a proceeding, under the internal revenue laws, to forfeit the premises because used for illegal distilling. When claims for the mechanics' liens were filed, and suits were brought to enforce the same, in accordance with the New Jersey statute, the premises were in the actual custody of the United States marshal, who had taken possession under process of attachment issued on an information to enforce a forfeiture, which resulted subsequently in a sale, and the deed under which defendant claimed. The sale under the proceedings in the state court took place a few days after that by the United States marshal. It was held that proceedings begun in the state court in the nature of proceedings *in rem* to subject the premises to sale were ineffectual to confer any legal

title on a purchaser, if at the time they were begun the property was in the actual custody of the federal court for the purpose of a judicial sale by the latter court. It was not decided, however, that the proceedings in the state court might not be valid to establish the lien. The holding was expressly limited to the point that a deed under the state proceeding vested no legal title, as against the title conferred by the court first having actual custody of the property. It was the actual custody of the premises in the federal court which excluded the right of another court to entertain jurisdiction of the proceeding to subject the property thus removed from its control and disposition to a sale for the purpose of vesting a title superior to that which might be conferred by the federal court. Mere constructive possession would not have been enough to exclude possession by another court. In a conflict of jurisdictions, it is manifest that there can be no constructive possession by one court, where it cannot take actual possession, but it by no means follows that the constructive possession of one court will exclude the actual taking possession by another. *For this reason, even if the proceeding in the Lucas common pleas to establish Compton's lien was a proceeding in rem, it did not involve the actual seizure of the property pending the suit, and did not, therefore, prevent the federal court from taking actual possession of the property, through its receivers, in a proceeding to foreclose mortgages and other liens than Compton's.* This objection to the jurisdiction of the court below over the Knox and Jesup bill cannot, therefore, be sustained." (Italics ours.)

So in the case at bar, the appellants' proceeding in the State Court does not involve the seizure of the *res* pending the suit.

The recent case of *Roger* v. *J. B. Levert Co.*, 237 Fed., 737 (advance sheets of the Federal Reporter for February 15, 1917), illustrates the point for which we are contending. In that case respondents held a mortgage on the property of the bankrupts. Foreclosure proceed-

ings were brought and the property ordered sold under executory process. Thereafter the bankrupt brought a suit for the purpose of annulling and setting aside the foreclosure. The respondent answered under the Louisiana law setting up a counterclaim that in the event the foreclosure should be annulled, then the respondents should be given judgment for the amount of the mortgage indebtedness, with full recognition of their mortgage rights. The State Court adjudged the foreclosure sale illegal and ordered that the respondents have judgment against the bankrupt for the original mortgage indebtedness, and that the property be seized and sold at auction to settle the mortgage. Immediately thereafter the bankrupt filed his petition in bankruptcy and trustees were appointed. The original suit was begun two years before the bankruptcy. The United States District Court on the ground of comity turned the property back to the State Court. In reversing this the Court of Appeals said (page 742):

> "The action pending in the state court between the Levert Company and the Moore Planting Company, at the time the latter filed its petition in bankruptcy, was a personal action, although mortgage rights were involved. See article 12, La. Code of Prac.; *Rogers* v. *Binyon*, 124 La., 95, 49 South., 991; also *Ker* v. *Evershed*, 41 La. Ann., 15, 6 South., 566. Such action could only have a semblance to a real action after an issuance of a writ of *fieri facias* and the seizure of the property on which the lien was claimed, and no writ of *fieri facias* had been issued, and of course, no seizure thereunder. And it may be noticed that in the state of the litigation between the parties no writ of *fieri facias* could be taken out except at the pleasure and convenience of the Levert Company at any indefinite time within ten years after the rendition of the judgment.
>
> At the time the Moore Company filed its petition in bankruptcy, said company was in full, undis-

turbed possession of all the plantations and property scheduled as assets in the bankruptcy; and, when the receivers were appointed, they took possession of all the property for the bankruptcy court, and they were in possession and control at the time the order complained of was entered.

The application of the Levert Company to the bankruptcy court for the appointment of one of their number as a co-receiver is a judicial admission of these facts, and it cannot be said that the bankruptcy court has seized and taken possession of property at the time in the possession and custody of the state court.

It seems, therefore, clear that, if we should concede that comity should prevail between the bankruptcy court and the state court, the case presented does not show a proper and necessary case for the exercise of the same."

The situation presented in this claimed conflict of jurisdiction between the State and Federal Courts is not simply one of theory, but must be judged with reference to what should be done to protect the *res* for the benefit of all interested parties and finally end litigation and permit a reorganization. It is true that the proceedings brought by the appellants in the State Court may be *in rem*, but these proceedings do not require any seizure of the *res,* nor have the appellants even suggested such a seizure. While this state proceeding has been permitted to rest in the State Court actual possession of the *res* was taken by Webster as trustee in bankruptcy, and subsequently by Webster as receiver in the foreclosure suit. The proceedings in the foreclosure suit are not identical with the proceedings in the State Court. Where there is no one in actual possession of the property in the State Court, no one capable under the issues there involved to maintain and operate the property, and where the conflicting rights arising in bankruptcy cannot be determined in the State Court and the appellees cannot

be compelled *in invitum* to prosecute their foreclosure action there, the Federal Court is not required to give up its peaceful possession and control of the *res*.

III.

We will discuss briefly the authorities cited by the appellants.

In *Palmer* v. *State of Texas*, 212 U. S., 118, the receiver had been actually appointed and qualified in the State Court, and his jurisdiction established. The two suits, are alike in purpose, each being in effect to dissolve the company and wind up its affairs. Such identity does not exist in the case at bar.

In *Farmers' Loan and Trust Co.* v. *Lake Street Elevated Railway Company*, 177 U. S., 51, a suit was started in the State Court to foreclose a mortgage. A bill was subsequently filed in the Federal Court to enjoin the foreclosure. As in the Palmer case, *supra*, the effect of the two suits was the same; one being to foreclose and the other to prevent foreclosure. Both involved the same matter. The distinction between this case and the case at bar is therefore plain.

Heidritter v. *Oil-Cloth Co.*, 112 U. S., 294. An ejectment suit. Plaintiff claimed under a sheriff's deed executed by order of a State Court in a mechanic's lien suit. Defendant claimed under a marshal's deed in a Federal proceeding for forfeiture for illegal use of the premises for distilling. When mechanic's lien suit was started property was in actual possession of marshal. It was the *actual custody* of the marshal which excluded the right of the State Court to subject the property which had been removed from its control to a sale for the pur-

pose of vesting a title superior to that which might be conferred by the Federal Court.

Byers v. *McAuley*, 149 U. S., 608. This was an attempt on a bill in equity filed in the Circuit Court of the United States, to declare a will and the probate thereof void and of no effect, and to enjoin the administrator from disposing of the real estate. It appeared that the administrator appointed by the State Court had possession of decedent's property. The court held that the State Court had exclusive jurisdiction in the administration of estates of deceased persons and that the Federal Court had no jurisdiction over such proceedings. This was a case of actual possession and exclusive jurisdiction.

In *Metcalf* v. *Barker*, 187 U. S., 165, a judgment creditor sought to enforce a lien long prior to the bankruptcy of the defendant, and it was held that the Bankruptcy Court could not enjoin the enforcement of such lien. In the case at bar the appellees are not attempting to enjoin the prosecution of the suit in the State Court.

The effect of *Pickens* v. *Roy*, 187 U. S., 177, is the same as in *Metcalf* v. *Barker, supra*. Also *Peck* v. *Jenness*, 7 How., 612, and *Eyster* v. *Gaff*, 91 U. S., 521, to the same effect. In each case the possession of the *res* was first secured by the State Court.

Bardes v. *Hawarden Bank*, 178 U. S., 524, simply held a bankruptcy court had no jurisdiction to set aside fraudulent transfers made by the bankrupt before the institution of the proceedings in bankruptcy.

In *Frazier* v. *Southern Loan and Trust Company*, 99 Fed., 707, a receiver had actually been appointed in the State Courts and the two actions were identical.

Mound City Company v. *Castleman et al.*, 187 Fed., 921, is another case of identical actions and *res adjudicata*.

It is to be noted that in practically all of the cases cited by the appellants the question is between the right of a bankruptcy court subsequently acquiring possession of the *res* to prevent proceedings in a State Court. In our case we have a foreclosure proceeding involving entirely different issues from the proceeding in the State Court, and no attempt is made by the appellees to prevent prosecution of the appellants' action in the State Court.

IV.

CONCLUSION.

The rule permitting a State Court having once required jurisdiction of the parties, to continue the particular suit to its determination is one of comity merely. It should not be enforced to the manifest injury of the *res* and of all the parties interested therein. The *res* in this particular case is not simply so much real estate, but an active, going concern. There are numerous questions of conflicting liens and rights; there is income from property belonging to the trustee in bankruptcy; there is income from property belonging to the appellees as mortgage creditors; there are pledged and unpledged purchase money mortgages; there are outstanding contracts for the sale of land and for the supply of water to innocent third persons. The Irrigation Company is admittedly insolvent. Expenditures are immediately and continuously necessary to maintain the property, to carry out the obligations of the Irrigation Company, and to protect the security. The effect of the litigation in the State Court was simply to tie the hands of the Irrigation Company and to force its bankruptcy. The effect of the bankruptcy was simply to stay the action of unsecured creditors and in no respect permitted the operation and maintenance of the *res*. It was only by the appoint-

ment of a receiver in the foreclosure suit that money could be raised to deliver water to the settlers and to protect the orchards of the Irrigation Company. It is indeed a most unusual thing that a Federal Court has permitted property in the hands of its trustee in bankruptcy to be turned over to a receiver in a foreclosure suit, but the Federal Judge, recognizing the exigencies of the situation, that the property must be operated, that the trustee in bankruptcy had no funds and no credit and could not operate the property, permitted the institution of the foreclosure proceedings in the Federal Court and appointed as receiver the trustee in bankruptcy, and thereby effected the operation and maintenance of the property through the season of 1916 by one authority for all interests.

As opposed to this constructive action of the Federal Judge, we have the action of the appellants. A suit, begun in the State Courts in June, 1915, a suit not yet brought to issue, no motion for receiver made, no certainty that one will ever be made; no plan of operation and maintenance even suggested or possible under the issues. The suit in the State Court is destructive of the *res* as a going irrigation system.

If the Federal Court in this case is to be deprived of its jurisdiction over the *res* merely because of the prior institution of a suit in the State Court, there is no possibility of an adjustment of the many conflicting claims—those of the appellants, the mortgage creditors, other lien holders, and contract creditors—there is no possibility of a division of the income of the Irrigation Company as a going concern between the mortgagees and the trustee in bankruptcy; there is no possibility of the continued operation and maintenance of the company. If the prayer of the appellants' answer is granted and control of the *res* taken away from the Federal Court, what

is to become of the property of the Irrigation Company and the settlers in the Valley dependent upon the continuous operation of its property for the very existence of their farms? The appellants have asked for no receiver. They may never ask for a receiver, or the court may never grant them a receiver. The Irrigation Company is bankrupt, the trustee in bankruptcy is without credit to finance the operation and maintenance of the property. It is only through one receivership and in one court that this property can be maintained, that its orchards can be cultivated and its settlers can receive water, and that a final reorganization can take place. We submit that it would be most unfortunate if this court should order the District Court to turn over the *res* from its receiver and from its trustee in bankruptcy now in peaceful, single possession, to the complete control of the State Court, and tnat it would be disastrous to the rights of every one interested in the property—the appellants, the appellees, the contract creditors, the stockholders of the Irrigation Company, and the settlers,—if this court should so fetter the Federal Court by refusing to permit the Federal Court to have any disposition of the *res,* with the result that the Federal Court should be unable to operate and maintain an irrigation system supplying thousands of farms over sixty miles of valley. And surely if the Federal Court cannot control the *res,* its receiver and its trustee in bankruptcy will be without credit to finance the operation of the irrigation system.

Respectfully submitted,

WINSTON, PAYNE, STRAWN & SHAW,
HENRY C. STIFF,
Solicitors for Appellees.

Silas H. Strawn
Garard B. Winston
of Counsel

No. 2888

United States

Circuit Court of Appeals

For the Ninth Circuit.

TAKAO OZAWA,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Names and Addresses of Attorneys.

For Petitioner Takao Ozawa,

CASTLE & WITHINGTON, #125 Merchant St., Honolulu, Hawaii.

J. LIGHTFOOT, Esq., Kapiolani Bldg., Honolulu, Hawaii.

For United States of America,

S. C. HUBER, Esq., United States District Attorney, Honolulu, Hawaii. [1*]

Statement of Clerk.

TIME OF COMMENCEMENT OF CAUSE.

October 16, 1914: Petition for Naturalization filed.

NAMES OF ORIGINAL PARTIES.

Petitioner: Takao Ozawa.

Respondent: United States of America.

DATES OF FILING OF THE PLEADINGS.

October 16, 1914. Petition.

HEARINGS.

January 30, 1915: Proceedings at hearing, petitioner and witnesses sworn and excused and continuance to February 13, 1915, for further hearing.

March 25, 1916: Proceedings at decision denying petition.

September 23, 1916: Proceedings at perfection of appeal.

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*Page-number appearing at foot of page of original certified Transcript of Record.

DECISION.

March 25, 1916: Decision denying Petition for Naturalization, by CLEMONS, J.

PETITION FOR APPEAL.

September 23, 1916: Petition for Appeal and Order allowing same filed.

United States of America,
District of Hawaii,—ss.

I, George R. Clark, Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit, the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings herein and the time when the judgment herein was rendered and the Judge rendering same, in the matter of Takao Ozawa, a petitioner for Naturalization, Number 274, in the United States District Court for the District of Hawaii. [2]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 17th day of November, A. D. 1916.

[Seal] GEORGE R. CLARK,
Clerk U. S. District Court, Territory of Hawaii.
[3]

In the United States District Court in and for the District and Territory of Hawaii.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

Order Extending Time to Transmit Record on Appeal.

Now on the 23d day of October, A. D. 1916, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and to transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of record on assignment of errors in the above-entitled matter within the time limited therefor by the Citation on Appeal heretofore issued in this cause, and it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of errors in this matter, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to November 30, 1916.

CHAS. F. CLEMONS,
Judge U. S. District Court, Territory of Hawaii.

Dated, Honolulu, Hawaii, October 23, 1916.

Due service of the above order, and receipt of a

copy thereof are hereby admitted this 23d day of October, A. D. 1916.

CASTLE & WITHINGTON,
By J. LIGHTFOOT,
J. LIGHTFOOT,
Attorneys for Appellant.

Filed Oct. 23, 1916, at 4 O'clock and — Minutes P. M. George R. Clark, Clerk. ————, Deputy Clerk. [4]

Declaration of Intention.

(Vignette.)

State of California,
County of Alameda,—ss.

Before the Clerk of the Superior Court Appeared, Takao Ozawa, a native of Japan, who, being duly sworn, upon his oath declares that it is bona fide his intention to become a citizen of the United States of America, and to renounce forever all allegiance and fidelity to all and any Foreign Prince, Potentate, State and Sovereignty whatever, and particularly to Mutsuhito, Emperor of Japan, of whom he is at present a subject.

(Sgd.) TAKAO OZAWA.

Subscribed and sworn to before me this 1st day of Aug., A. D. 1902.

————————————,
Deputy Clerk.

I, Frank C. Jordan, Clerk of the Superior Court in and for the County of Alameda, the same being a

court of record, having common-law jurisdiction, a clerk and seal, do hereby certify that the foregoing is a true copy of the original Declaration of Intention of Takao Ozawa to become a citizen of the United States of America, now of record in my office.

TO ATTEST AND CERTIFY WHICH, I have hereunto set my hand and affixed the seal of said court, this 1 day of Aug., A. D. 1902.

[Seal] FRANK C. JORDAN,
Clerk.
By (Sgd.) L. R. McKILLICAN,
Deputy. [5]

NO. 274. ORIGINAL.

UNITED STATES OF AMERICA.

PETITION FOR NATURALIZATION.

To the Honorable UNITED STATES DISTRICT COURT OF TERRITORY OF HAWAII.

The petition of Takao Ozawa hereby filed, respectfully showeth

First: My Place of residence is #1322 Kamehameha 4th Road, Honolulu, Hawaii.

(Give number, street, city or town, and State.)

Second: My occupation is Salesman.

Third: I was born on the 15th day of June, Anno Domini 1875, at Sakuraimura, Japan.

Fourth: I emigrated to the United States from Yokohama, Japan, on or about the 17th day of July Anno Domini 1894, and arrived in the United States, at the port of San Francisco, California, on the 29th

day of July Anno Domini 1894, on the vessel S. S. "Galic."

(If the alien arrived otherwise than by vessel, the character of conveyance or name of transportation company should be given.)

Fifth: I declared my intention to become a citizen of the United States on the 1st day of August, Anno Domini 1902 at Oakland, California, in the Superior Court of County of Alameda, California.

Sixth: I am married. My wife's name is Masako Ozawa. She was born in Yamakuchi, Japan, and now resides at #1322 Kamehameha 4th Road, Honolulu, Hawaii.

(Give number, street, city or town, and State.)

I have two children, and the name, date and place of birth, and place of residence of each of said children is as follows: Takako, born July 24, 1909, at Honolulu, Hawaii, and resides at Honolulu, Hawaii, Edith Sachiko, born October 16th, 1912, at Honolulu, Hawaii, and resides at Honolulu, Hawaii.

Seventh: I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached [6] to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to Yoshihito, Emperor of Japan, of whom at this time I am a subject, and it is my intention to reside permanently in the United States.

Eighth: I am able to speak the English language.

Ninth: I have resided continuously in the United States of America for the term of five years at least, immediately preceding the date of this petition, to wit, since the 29th day of July, Anno Domini 1894, and in the Territory of Hawaii, continuously next preceding the date of this petition, since the 25th day of May, Anno Domini 1906, being a residence within this Territory of at least one year next preceding the date of this petition.

Tenth: I have not heretofore made petition for citizenship to any court.

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States, together with my affidavit and the affidavits of the two verifying witnesses thereto, required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

(Sgd.) TAKAO OZAWA,

(Complete and true signature of petitioner.)

Declaration of Intention filed this 16th day of October, 1914.

Affidavits of Petitioner and Witnesses.

United States of America,
Territory of Hawaii,—ss.

The aforesaid petitioner being duly sworn, deposes and says that he is the petitioner in the above-entitled proceedings; that he has read the foregoing petition and knows the contents thereof; that the

said petition is signed with his full, true name; that the same is true of his own knowledge except as to matters therein stated to be alleged upon information and belief, and that as to those matters [7] he believes it to be true.

(Sgd.) TAKAO OZAWA,

(Complete and true signature of petitioner.)

Benjamin Hornblower Clarke, occupation salesman, residing at Honolulu, Hawaii, and Louis Aloysius Perry, occupation clerk, residing at Honolulu, Hawaii, each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known Takao Ozawa, the petitioner above mentioned, to have resided in the United States continuously immediately preceding the date of filing his petition, since the 1st day of January, Anno Domini 1909, and in the Territory in which the above-entitled petition is made continuously since the 1st day of January, Anno Domini 1909; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that the petitioner is in every way qualified, in his opinion, to be admitted a citizen of the United States.

(Sgd.) BENJAMIN H. CLARK,

(Signature of witness.)

(Sgd.) LOUIS A. PERRY,

(Signature of witness.)

Subscribed and sworn to before me by the above-named petitioner and witnesses this 16th day of October, Anno Domini 1914.

[Seal] (Sgd.) A. E. MURPHY,
Clerk. [8]

In the Matter of the Petition of Takao Ozawa, to be Admitted a Citizen of the United States of America.

Filed Oct. 16, 1914.

OATH OF ALLEGIANCE.

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to Yoshihito, Emperor of Japan, of whom I have heretofore been a subject, that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same.

_____,

Subscribed and sworn to before me, in open court, this —— day of ——, A. D. 191—

_____,
Clerk.

ORDER OF COURT ADMITTING PETITIONER.

Upon consideration of the petition of Takao Ozawa, and affidavits in support thereof, and further testimony taken in open court, it is ordered that the said petitioner, who has taken the oath required

by law, be, and hereby is, admitted to become a citizen of the United States of America, this —— day of —— A. D. 19—.

By the Court:

————————————, J——.

ORDER OF COURT DENYING PETITION.

Upon consideration of the petition of Takao Ozawa and the motion of Hon. Horace W. Vaughan, United States Attorney, who appeared for the United States in open court this 25th day of March, 1916, it appearing that he is ineligible to citizenship, as shown more fully in my decision of this day. [9]

The said petition is hereby denied.

(Sgd.) CHAS. F. CLEMONS,
Judge. [10]

Minutes of Court—January 30, 1915—Proceedings at Hearing and Order of Continuance.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 1, Saturday, January 30, 1915. Page 484.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney, Mr. J. W. Thompson and also came the above petitioner in person and with his witnesses Benjamin Hornblower Clarke and Louis Aloysius Perry, and this cause was called for hearing. Thereupon the said petitioner and his witnesses were sworn and examined, whereupon it was by the Court ordered that said witnesses be excused

and that this cause be continued to February 13, 1915, at 10 o'clock A. M., for further hearing. **[11]**

Minutes of Court—February 13, 1915—Order Continuing Hearing to April 10, 1915.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 1, Saturday, February 13, 1915. Page 508.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney, Mr. J. W. Thompson, and also came the above petitioner in person and without witnesses and this cause was called for further hearing. Thereupon it was by the Court ordered that this cause be continued to April 10, 1915, at 10 o'clock A. M., for further hearing. **[12]**

Minutes of Court—April 10, 1915—Order Continuing Hearing to April 24, 1915.

(Clemons, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 1, Saturday, April 10, 1915. Page 567.

(Title of Court and Cause.)

On this day came the above petitioner in person and without his witnesses, said witnesses having been heretofore examined and excused, and this cause was called for further hearing. Thereupon it was by the Court ordered that this cause be contin-

ued to April 24, 1915, at 10 o'clock A. M., for further hearing. **[13]**

Minutes of Court—April 24, 1915—Order on Hearing.

(Clemons, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, April 24, 1915. Page 612.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney, Mr. J. W. Thompson, and also came the above petitioner in person and without his witnesses, said witnesses having been heretofore examined and excused, and this cause was called for further disposition. Thereupon it was by the Court ordered that this cause be continued to May 29, 1915, at 10 o'clock A. M., for further disposition. **[14]**

Minutes of Court—May 29, 1915—Order on Hearing.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, May 29, 1915. Page 680.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney, Mr. J. W. Thompson, and also came the above petitioner in person and without witnesses, said witnesses having been heretofore

examined and excused, and this cause was called for further disposition. Thereupon the said petitioner having filed his brief in open court, it was by the Court ordered that this cause be continued to June 26, 1915, at 10 o'clock A. M., for further disposition. **[15]**

Minutes of Court—June 26, 1915—Order on Hearing.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, June 26, 1915. Page 717.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney, Mr. J. W. Thompson, the above petitioner being absent, and this cause was called for further hearing. Thereupon it was by the Court ordered that this cause be continued to July 31, 1915, at 10 o'clock A. M., for further hearing. **[16]**

Minutes of Court—July 31, 1915—Order on Hearing.

(Clemons, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, July 31, 1915. Page 737.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney, Mr. J. W. Thompson, said petitioner being absent, and this cause was called

for further disposition. Thereupon Mr. Thompson filed on behalf of the United States its brief herein and it was by the Court ordered that this cause be continued to August 28, 1915, at 10 o'clock A. M., for further disposition. **[17]**

Minutes of Court—August 28, 1915—Order of Continuance.

(Clemons, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, August 28, 1915. Page 771.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney, Mr. J. W. Thompson, above petitioner being absent, and this cause was called for further disposition. Thereupon it was by the Court ordered that this cause be continued to September 25, 1915, at 10 o'clock A. M., for further disposition. **[18]**

Minutes of Court—September 25, 1915—Order of Continuance.

(Clemons, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, September 25, 1915. Page 816.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney, Mr. J. W. Thompson, and said petitioner in person, and this cause was called

for decision. Thereupon it was by the Court ordered that this cause be continued to October 30, 1915, at 10 o'clock A. M., for decision. **[19]**

Minutes of Court—October 30, 1915—Order of Continuance.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, October 30, 1915. Page 877.

(Title of Court and Cause.)

On this day came the United States by its District Attorney, Mr. Jeff McCarn, and said petitioner in person, and this cause was called for disposition. Thereupon it was by the Court ordered that this cause be continued until called up for further disposition. **[20]**

Minutes of Court—November 27, 1915—Order of Continuance.

(DOLE, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, November 27, 1915. Page 948.

(Title of Court and Cause.)

On this day came the United States by its District Attorney, Mr. Jeff McCarn, and also came the above petitioner, and this cause was called for decision. Thereupon it was by the Court ordered that this cause be continued to December 29, 1915, at 10 o'clock A. M., for decision. **[21]**

Minutes of Court—December 27, 1915—Order of Continuance.

(Clemons, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Monday, December 27, 1915. Page 991.

(Title of Court and Cause.)

On this day came the United States by its District Attorney, Mr. Horace W. Vaughan, said petitioner being absent, and this cause was called for decision. Thereupon it was by the Court ordered that this cause be continued to January 29, 1916, at 10 o'clock A. M., for said decision. **[22]**

Minutes of Court—January 29, 1916—Order of Submission.

(CLEMONS, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, January 29, 1916. Page 1057.

(Title of Court and Cause.)

On this day came the United States by its District Attorney Mr. Horace W. Vaughan, neither said petitioner or his witnesses being present, said witnesses being heretofore examined and excused from further attendance. Thereupon the case was by the Court taken under advisement. [23]

Minutes of Court—February 26, 1916—Order of Continuance.

(CLEMONS, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, February 26, 1916. Page 1110.

(Title of Court and Cause.)

On this day came the United States by its Assistant District Attorney Mr. Samuel B. Kemp, neither said petitioner or his witnesses being present, said witnesses being heretofore sworn and examined and excused from further attendance, and this cause was called for decision. Thereupon it was by the Court ordered that this cause be continued to March 25, 1916, at 10 o'clock A. M., for decision. [24]

Minutes of Court—March 25, 1916—Order on Filing of Opinion, etc.

(CLEMONS, Presiding Judge.)

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, March 25, 1916, Page 1158.

(Title of Court and Cause.)

On this day came the United States by its District Attorney Mr. Horace W. Vaughan and said petitioner in person, and this cause was called for decision. Thereupon the Court read and filed its decision denying said petition. [25]

In the United States District Court, Territory of Hawaii.

APRIL, A. D. 1916, TERM.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

Decision.

Filed Aug. 17, 1916, at 1 o'clock and 55 minutes P. M. (Sgd.) George R. Clark, Clerk. ———— Deputy Clerk. [26]

In the United States District Court, Territory of Hawaii.

APRIL, A. D. 1916, TERM.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

March 25, 1916.

Aliens — Naturalization — Japanese: A person of the Japanese race born in Japan, is not eligible to citizenship under the naturalization laws. Rev. Stat., sec. 2169.

Petition for Naturalization.

TAKAO OZAWA, *pro se.*

HORACE W. VAUGHAN, United States District Attorney, and J. W. THOMPSON, Assistant United States Attorney, opposed. [27]

This petition for naturalization is opposed by the United States district attorney on the ground

that the petitioner, being, as the facts are, a person of the Japanese race and born in Japan, is not eligible to citizenship under Revised Statutes, section 2169, which limits naturalization to "free white persons" and those of African nativity and descent. The other qualifications are found by the Court to be fully established, and are conceded by the Government. Twenty years' continuance residence in the United States, including over nine years' residence in Hawaii, graduation from the Berkeley (Cal.) High School, nearly three years' attendance at the University of California, the education of his children in American schools and churches, the maintenance of the English language in his home, are some of the facts in his behalf. And he has presented two briefs of his own authorship, in themselves ample proof of his qualifications of education and character. He makes the main points that in the statute the word "white" is "not used to exclude any race at all," or in other words is used "simply to distinguish black people from others," and that even in a narrow sense of the word "white" the Japanese are eligible to citizenship. Also, as to the word "free" in the expression "free white persons," the contention is made, that this word designates the quality of person and implies goodness, worthiness, excluding only improper persons.

The first contention is regarded by the petitioner as supported by the learned opinion of Judge Lowell in the case of In re Halladjian, 174 Fed. 834. A

brief discussion of this opinion is therefore called for, and may serve to enforce our own conclusions. The syllabus of the case reports the Court as holding: [28]

> "That the word 'white' was used to classify the inhabitants and to include all persons not otherwise classified, not as synonomous with 'European,' there being in fact no 'European' or 'white' race as a distinctive class, or 'Asiatic' or 'yellow' race, including substantially all the people of Asia; and hence the term 'free white persons' included Armenians born in Asiatic Turkey."

This is a broad ruling, and although a ruling was required only as to the eligibility of Armenians, it may appear even broad enough to divide the eligible classes into Africans and *all others,* subject of course to the exception, created by a statute of later date, in the case of Chinese. Without questioning Judge Lowell's conclusion that Armenians are eligible to citizenship, it seems that he goes too far in saying, Id., 843, that:

> "From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the Government to designate persons not otherwise classified."

His citation, for example, of the classification of the Massachusetts census of 1764, which included only whites, Negroes, mulattoes, Indians, and

"French neutrals," and that of the Rhode Island census of 1748, which included only whites, blacks, and Indians, would be far from proof that Oriental races, particularly the Japanese, or even the indefinite race or races, were included or thought of at all. The most that would naturally be inferred from the use of the word "white" as a "catch-all," as Judge Lowell characterizes it, Id., 843, is the inclusion therein of all unclassified inhabitants then in the country and not as a rigid classification to endure for all time and to include particularly persons of the Oriental races or of the so-called "yellow" races, who, as will be seen, have at all times under accepted classifications been regarded as ethnologically distinct from the white race. And the fact that as occasion arose, from the presence of a noticeable number of Chinese or [29] Japanese, those new-comers received in the census reports a special classification, weakens very much the extreme view which may be implied from Judge Lowell's opinion. If the word "white" was a catch-all, why was its use not generally continued, to include these later immigrants? Judge Lowell's opinion itself shows that when the Oriental population, as represented first by the Chinese, came to be appreciable, beginning with the census of 1860 (*i. e.,* at the first opportunity after the census of 1850), the word "white" ceased to be used as a catch-all to designate those people, but they were specially classified by race. Id., 844; also, 482, quoting from the Eleventh Census, part I., p. xciv. The fact that such classification was adopted as our

population of Oriental peoples became appreciable, belies Judge Lowell's statement, 174 Fed. 843–844, that "after the majority of Americans has come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white." Too much is not to be inferred from the use of the words "white" and "black," or "white" and "negro," in early times when these were undoubtedly the only, or practically the only, classes here other than the Indians. Nor is undue credit to be given to even much later, and recent, census classifications which were "not uniform in all parts of the country." Id. 842–843, or where much was left to the discretion of the director of the census. Id., 843. Far more reliance may fairly be placed upon the considered judgments of courts, rendered at least as early as 1878, or perhaps 1854, in contested cases,—upon the judgments of those whose peculiar duty it was to determine the meaning of this word "white."

Such a comprehensive meaning of the word "white" as that contended for, would include Indians, yet the Supreme Court [30] in 1884 did not regard the statute, Revised Statutes, section 2169, as so broad. See Elk v. Wilkins, 112 U. S. 94, 104, also the considerably earlier case of Scott v. Sanford, 19 How. 393, 420, which says, "Congress might . . have authorized the naturalization of Indians, because they were aliens and foreigners." If Indians were excepted, then why not also the

races of the Orient, who though since found to be more adaptable to our manners and customs, were in the earlier days regarded as strange peoples, of manners and customs incompatible with ours. The fact that more lately we have come to better appreciate, that, in the language of William Elliott Griffis ("The Japanese Nation in Evolution," 24),

> "There is no necessary distinction between the Oriental and Occidental, the brown man and the white man. That the "yellow brain," and the Japanese heart are ultimately different from those of the Yankee or the Briton, is the notion of tradition, not the fact of science,"

does not justify the setting aside of an interpretation well-established prior to the date of any of the cases, an incomplete list of fourteen of which is submitted by the petitioner,—there being, it is understood, about fifty in all,—of Japanese who have been naturalized by State and Federal courts. The earliest of these fourteen cases, that of Seizo Matsumoto, naturalized by a court of Pierce County, Washington, is as recent as January, 1896, two years later than the case of In re Saito, 62 Fed. 126, and sixteen or more years subsequent to two cases which took a view broad enough to exclude Japanese: In re Camille, 6 Fed. 256, and In re Ah Yup, 1 Fed. Cas. 223, No. 104. Indeed, as early as 1827, Chancellor Kent inclined to the same opinion as the two cases just cited; for he says in his Commentaries, volume, 2 page 72:

> " The act of Congress confines the description of aliens capable of naturalization to 'free white persons.' I presume this excludes the inhabitants [31] of Africa, and their descendants; and it may become a question, to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be diffculties also as to the copper-colored natives of America, or the yellow or tawny races of the Asiatics, and it may well be doubted whether any of them are 'white persons' within the purview of the law."

And in 1854, the dictum of Chief Justice Murray of California in People v. Hall, 4 Cal. 399, 403, 404, is that "the word 'white' has a distinct signification, which *ex vitermini* excludes black, yellow and all other colors."

In the case of Ah Yup, *supra,* in holding that Chinese are not white persons, Circuit Judge Sawyer in 1878 said:

> "The word 'white person,' as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be legally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But those words in this country at least, have undoubtedly acquired a well-settled meaning in common popu-

lar speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race.

"In speaking of the various classifications of races, Webster in his dictionary says, "The common classification is that of Blumenbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or Negro (black) race, occupying all Africa, except the North; 4. The American or red race, containing the Indians of North and South America; and, 5. The Malay, or Brown race, occupying the islands of the Indian Archipelago' etc. This division was adopted from Buffen, with some changes in names, and is founded on the combined characteristics of complection, hair and skull. Linnaeus makes four divisions, founded on the color of the skin; '1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and, 4. African, black.' Culiver makes three; Caucasian, Mongel, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those

classifications recognizing color as one or the distinguishing characteristics includes the Mongolian in the white or whitish race.' See New American Encyclopedia, tit. 'Ethnology.' [32]

"Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term 'white person' as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term 'white person' any other than an individual of the Caucasian race. I do find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolian.

. . . Whatever latitudinarian construction might otherwise have been given to the term 'white person,' it is entirely clear that Congress intended by this legislation to exclude Mongolians from the right of naturalization."

This case was determined four years before the enactment of a special statute prohibiting the naturalization of Chinese. 22 Stat. 53, 61. It is quoted at length to include its review of the then prevailing race classifications.

In 1880 in In re Camille, *supra,* 6 Fed. 257, Judge Deady approved of Judge Sawyer's view above quoted, though the case involved not a person of an Oriental race but one of Indian blood. See also, the specific reference to the Chinese, Id., 258.

In 1894, Circuit Judge Colt, in the case of In re Saito, *supra,* rules directly on the eligibility of Japanese. He says:

> "The history of legislation on this subject shows that Congress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.
>
> "The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.
>
> "From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races. [33]
>
> "And this is true from a scientific point of view. Writers on ethnology and anthropology

> base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race, and it lies in the foundation of the classification which scientists have adopted."

Judge Hanford in the case of In re Buntaro Mumagai, 163 Fed. 922, 924, is of opinion that:

> "The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

He cites in support of this opinion the cases of Ah Yup and Saito, *supra*, and also the case of In re Yamashita, 30 Wash. 234, 70 Pac. 42 (1902). His opinion is followed in the case of In re Knight, 171 Fed. 299, in which the applicant was one-quarter Japanese and one-quarter Chinese and in which Judge Chatfield holds, Id., 300, that neither Chinese nor Japanese can be naturalized,—though, it is true, it was only necessary for him to hold for the purposes of the case, that the substantial element of Chinese blood was sufficient to exclude the petitioner, regardless of the eligibility of Japanese.

And the Circuit Court of Appeals of the Fourth Circuit in Bessho v. United States, 178 Fed. 245, and Judge Cushman in In re Young, 198 Fed. 715, held expressly that Japanese aliens are ineligible to citizenship.

To meet any argument that the enactment of a special statute prohibiting naturalization only of Chinese, implies the eligibility of the Japanese, who are not included in any special prohibition, reference is made to In re Kanaka Niau, 21 Pac. 993–994, 6 Utah, 259 (1889), and Bessho vs. United States, 178 Fed. 245, 248 (Circuit Court of Appeals), also in In re Ah Yup, [34] 1 Fed. Cas. 224, decided as above noted, before the enactment of the special prohibition against Chinese, In re Saito, 62 Fed. 127, and Fong Yue Ting vs. United States, 149 U. S. 698, 716.

As against these authorities, no reported case is known in which a person of the Japanese race has been naturalized, in which the Court has rendered a written opinion to justify its ruling or in which there has been a contest to evoke the most thorough consideration. There are recent judicial opinions, that the statute in its present form is not to be "construed in the light of the knowledge and conception of the legislators who passed the original statute in 1790, without regard to the more definite and special knowledge and conception which must be attributed to the legislators who upon reconsideration of the whole subject, enacted subsequent statutes including that now in force." Dow vs. United States, 226 Fed. 145, 147. See also In re Muddari, 176 Fed.

465, 467, and a learned opinion of Judge Morrison of the Superior Court of California, rendered May 7, 1914, in the case of In re Sakharan Ganesh Pandit. But the Dow case, for example, in using the language just quoted and in referring to more recent legislation, had in mind the legislation of 1875 in which the words "free white persons," omitted by error from the revision of 1873 (62 Fed. 127) were restored. 226 Fed. 147. And, aside from the circumstance that the decisions just referred to were dealing with border-line cases of races closely related to what may be loosely called the "Europeans," who were perhaps in 1780 here considered as the only white people (226 Fed. 145, 147, 148), it is of most practical importance to bear in mind that the ethnological divisions which classed the Japanese as of the Mongolian or yellow race, were what the legislators **[35]** of 1875 and the courts thereafter down even to the present have had to rely upon as their guides. See quotation in In re Ah Yup, *supra* (1878) from Webster's Dictionary, probably the most widely circulated work in America except the Bible, and even the very recent edition of the Encyclopedia Brittanica, 11th ed., vol. 9, page 851. This classification was undoubtedly well known in this country early in the last century, as it was in Germany before 1790, the date of the original enactment of the statute. Even if, as the petitioner contends, Blumenbach's classification is unscientific (see In re Dow, 213 Fed. 355, 358, 359, 365; In re Mudarri, 176 Fed. 466, 467), nevertheless it has not yet been superseded so far as to assimilate the Jap-

anese with what for many years, at least as early as 1854, and especially before 1875, has been generally regarded as the "white" race.

Tylor, one of the highest authorities, in his book of 1881, "Anthropology" (Appleton's ed. 63, 96–98), points out that the Japanese have characteristics of the "Mongoloid type of man" in which one prominent feature is that "their skin is brownish yellow." The most recent encyclopedic authority, 9 Enc. Britt. 11th ed. (1910), 851, classes the Japanese as Mongolic or yellow, though placing the Ainos, a small element of the people of Japan, as Caucasic or white. See also 15 Id., 165. In addition to this unobstructed current of authority reference may be had to a very late work, "A History of the Japanese People," by Captain F. Brinkley, included by Dr. William Elliot Griffis in a list of the English scholars who "have made obsolete most of the old European learning about Japan." "The Japanese Nation in Evolution," 20.

> "The Japanese are of distinctly small stature. . . . Their neighbors, the Chinese and the Koreans, are taller. . . . Nevertheless, Professor Dr. Baelz, the most eminent authority on this subject, avers that 'the three great **[36]** nations of Eastern Asia are essentially of the same race,' and that observers who consider them to be distinct 'have been misled by external appearances.'" Brinkley, History, etc. *supra*, 57–58, see also 59, 60. That the Japanese have, however, an element of white, Caucasian or Iranian, blood is noted. Id. 58, see also 45, 54, 55.

Another recent book may be quoted as giving the opinion of a Japanese educator, "The Life and Thought of Japan," by Okakura Yoshisaburo: (published by E. P. Dutton & Co., 1913):

"And as to those swarms of immigration from China and Korea, who crossed the sea at various periods in the early days of Japanese history, it did not take many generations before they came to adopt the views of the people with whom it was their interest in every way to get mixed, and thus they lost their own identity. In this manner, notwithstanding an extensive admixture of foreign elements to our original stock, we find ourselves as closely unified a nation as if we had been perfectly homogeneous from the very beginning. One and the same blood is felt to run through our veins, characterized by one and the same set of religious and moral ideas. This may perhaps be due to the fact that the three elements—the conquering, the conquered, and the immigrating—belonged originally to the same Mongolian race, with very little trace of any mingling of Ainu and Malayan blood." Id., 48, 49.

"You will come, at least to some extent, to acknowledge the truth of the statement so often made in books on Japan, that there are two distinct racial face-types among the present Japanese . . . Be it remembered that both these types are Mongol. Both have the yellowish skin, the straight hair, the scanty beard, the broadish skull, the more or less oblique eyes,

and the somewhat high cheekbones, which characterize all well-established branches of the Mongol race." Id., 41.

"The relation here displayed between the living and the departed may be considered as a characteristic of the Mongolian race to which both the Japanese and the Chinese belong." Id., 54.

Whether these views just quoted are wholly accurate or not, I do not undertake to say. They are at all events, in line with the statements of scientific works which have been, as already intimated, the guides of our courts in all cases known to have been contested or in which the Court rendered a written opinion,—even though recognizing that there is in the Japanese an element of white blood. See reference to Brinkley, *supra.*

Dr. Griffis' interesting book, in a broad spirit of **[37]** tolerance, notable in one for forty years in the closest touch with Japan and for some years a resident there, goes far to demonstrate the conclusion that "the Japanese are not Mongolian." "The Japanese Nation in Evolution," 400. Rev. Dr. Doremus Scudder, of Honolulu, who is himself intimately acquainted with the Japanese people, and who may be termed a friend of the court, has submitted in behalf of the petitioner this authority as tending at least to support the view that the Japanese are "white persons" even in a narrow sense of those words. But Dr. Griffis, after all, does not seem to be at variance with the common authorities on ethnology. It is plain that he is speaking

of the later development of the Japanese away from all that is narrow in the sense of "Mongolic," or "Oriental,"—of their "both deserving and winning success," Id., 400, in competition, or rather comparison, with the most progressive and enlightened peoples of the world. He recognizes the Mongolic element constantly. "White men, belonging to the great Aryan family and speaking a language akin to the Indo-Germanic tongues, were the first 'Japanese,' who are a composite and not a pure 'Mongolian' race. Their inheritance of blood and temperament partakes of the potencies of both Europe and Asia." Id., 1, also 21, 25, 349. He also recognizes the Malay element, which, at least "the Malay peoples of the Eastern archipelago,"—the last edition of the Encyclopedia Brittanica includes in the Mongolic or yellow division of the races, though "less typical" but with the "Mongolic elements so predominant as to warrant inclusion." Says Dr. Griffis, Id., 30, "Those most familiar with the races, the Mongol, Aryan and the Malay, now so differentiated, consider that in the Nippon composite the Malay strain predominates." **[38]**

Also Id., 30–31 et seq. Though Dr. Griffis believes that "the basic stock of the Japanese people is Aino" (a white people) . . . "by 'basic stock' . . . mean(ing) the oldest race in the islands" (Id. 5, also 1), yet he speaks of the Ainos as having been "crowded out" (Id., 9)—elsewhere characterizing the process as absorption not elimination (Id., 26); and Brinkley, History, etc., *supra*, 56 (see also 44), notes the "steady extermination for twenty-five

centuries'' of the Ainu element, characterized by him as having ''left as little trace in the Japanese nation.'' Id., 58.

Intelligent men, of course, agree with Dr. Griffis that the words ''Mongolian'' and ''Oriental,'' as mere epithets, can bear no sense of unworthiness or inferiority in the case of the Japanese people.

A few words are called for by the cited examples of the Magyars of Hungary and of the very dark Portuguese, who are both freely admitted to citizenship, in spite of the fact that the former are Mongolic in origin and that the latter are in a strict sense of the word not ''white.'' Many of the decisions admit the difficulties inherent in the statutory classification, and even Judge Lowell has declared that he ''greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in section 2169.'' In re Mudarri, 176 Fed. 465, 467. Indeed in this latter case his language seems to cast doubt upon the practicability of the rule applied in the Holladjian case. He says, 176 Fed. 467,

> ''No modern theory has gained general acceptance. Hardly anyone classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend to draw; e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first

> naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying [39] and conflicting classification of persons in the usage of successive generations and of different parts of a large country."

But the examples just cited may be regarded as exceptional. Centuries before our first legislation on naturalization, the Magyars had "become physically assimilated to the western peoples." 17 Enc. Britt., 11th ed., 393, 394. "In their new environment their Mongolic physical type has gradually conformed to the normal European standard." Webster's New International Dictionary (1913), tit. "Magyar," quoting A. H. Keane. They have long been "one of the dominant people of Hungary—which they conquered at the close of the ninth century," Id.; and they with the Portuguese of varying degrees of color, are within the meaning of "white," as commonly understood, and as explained by Judge Cushman, in the case of In re Young, 198 Fed., 716, 717:

> "The term 'white person' must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as 'fair whites' or 'dark whites,' as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

> "It is just as certain that, whether we consider the Japanese as of Mongolian race, or the Malay race, they are not included in what are commonly understood as 'white persons.' "

See, also, Dow v. United States, 226 Fed. 145, 147.

Though the intent of the word 'white' is determinative of the case, we may well dispose of the petitioner's argument that the use of the word "free" in the expression "free white persons" emphasizes the element of worthiness, good quality, as against the element of color. The use of the word "free" in the debates in the Constitutional Convention in 1787 affords most reliable evidence of what the word meant at about and shortly before, its first use in the naturalization laws. It is recorded that Gouverneur Morris in moving to insert "free" before the word "inhabitants," with reference to the apportionment **[40]** of members of the House of Representatives, used the word as the opposite of "slave." Madison's Journal of the Constitutional Convention (Albert Scott & Co., Chicago, 1893), 478. And such has always been its intent, not only when this statute had its origin but shortly after the Civil War when the statute was revised after a brief suspension—though the retention of the word "free" had then become unnecessary.

As lately as 1906 Congress went over the whole law of naturalization, and yet in the face of the well-known rulings of the published decisions which had interpreted the particular section here in question, the section was left just as it was. This is a very persuasive reason for the conclusion that Congress

acquiesced in, and adopted, the interpretation which the courts had put upon its own work. 226 Fed. 145, 148. The remedy for uncertainty in the statute, or for its unfairness or inconsistency with the theory and spirit of our institutions, lies, of course, with the legislative body.

In view of the foregoing authorities and considerations, the Court finds that the petitioner is not qualified under Revised Statutes, section 2169, and must therefore deny his petition; and it is so ordered, in spite of the finding hereby made that he has fully established the allegations of his petition and, except as to the requirements of section 2169, is in every way eminently qualified under the statutes to become an American citizen.

(Sgd.) CHAS. F. CLEMONS,
Judge of the United States District Court for the Territory of Hawaii.

[Endorsed]: No. 274. (Title of Court and Cause). Decision. Filed Aug. 17, 1916, at 1 o'clock and 55 Minutes P. M. (Sgd.) George R. Clark, Clerk. [41]

In the United States District Court, Territory of Hawaii.

April, A. D. 1916 Term.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

Bill of Exceptions.

BE IT REMEMBERED that at the trial of the above-entitled cause the petitioner appeared in person, and the petition was opposed by the United States District Attorney for the District of Hawaii on the ground that the petitioner, being a person of the Japanese race and born in Japan, is not eligible to citizenship under Revised Statutes, Section 2169. The other qualifications were proved, including all the statements in the petition, and found to be fully established, and are so conceded by the government.

The applicant had for twenty years continuously resided in the United States, including the last nine years' residence in Hawaii. He graduated from the Berkeley, California, High School, and was for nearly three years a student at the University of California, until it was closed by the earthquake in 1906. He has educated his children in American schools and he and his family have attended American churches, and he has maintained the use of the English language in his home. He presented two **[42]** briefs of his own authorship, which are ample proof of his qualification, by education and character.

The Court found that the contention of the United States District Attorney is correct and that, although the applicant was eligible for citizenship in every other respect, yet having been born in Japan and being of the Japanese race, as a matter of law

he was not eligible to naturalization, and denied the petition, to which the petitioner excepted.

DATED, Honolulu, T. H., August 17, 1916.

(Sgd.) CASTLE & WITHINGTON,
(Sgd.) J. LIGHTFOOT,
Attorneys for Petitioner.

The foregoing Bill of Exceptions is allowed and settled this 17th day of August, 1916.

(Sgd.) CHAS. F. CLEMONS,
Judge.

O. K.—(Sgd.) S. C. HUBER, U. S. Atty.

[Endorsed]: No. 274. (Title of Court and Cause.) Bill of Exceptions. Filed Aug. 17, 1916, at 1 o'clock and 55 minutes P. M. (Sgd.) George R. Clark, Clerk. **[43]**

Minutes of Court—September 23, 1916—Order Allowing Appeal.

From the Minutes of the United States District Court, Vol. 9, Part 2, Saturday, September 23, 1916, Page 172.

[Title of Court and Cause.]

On this day came the United States by its District Attorney, Mr. S. C. Huber, and also came Mr. J. Lightfoot, counsel on behalf of the above-named petitioner, and this cause was called for perfection of appeal by said petitioner. Thereupon Mr. Lightfoot moved that this cause be appealed to the Ninth Circuit Court of Appeals, San Francisco, California. The satisfactory documents having been filed, said motion was by the Court allowed. **[44]**

In the United States District Court, Territory of Hawaii.

April A. D. 1916 Term.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

Petition for an Allowance of Appeal.

To the Honorable HORACE W. VAUGHAN, District Judge, Presiding Therein:

The above-named petitioner, conceiving himself aggrieved by the decision and order made and entered herein on March 25, 1916, denying the application of the petitioner for naturalization, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the said decision and order, for the reasons specified in the Assignment of Errors hereto attached and he prays that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said decision and order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

DATED Honolulu, T. H., September 25, 1916.

(Sgd.) CASTLE & WITHINGTON,
(Sgd.) J. LIGHTFOOT,
Attorneys for Petitioner. [45]

Order Allowing Appeal and Fixing Supersedeas Bond.

The foregoing petition is hereby granted and the appeal allowed; and that is ordered that a certified

transcript of the record, papers and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that the amount of the bond on appeal be fixed at the sum of five hundred dollars ($500), the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Done in open court this 25th day of September, 1916.

(Sgd.) HORACE W. VAUGHAN,
Judge.

[Endorsed]: No. 274. (Title of Court and Cause.) Petition for an Allowance of Appeal. Filed Sep. 23, 1916, at 2 o'clock and 10 minutes P. M. George R. Clark, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [46]

In the United States District Court, Territory of Hawaii.

April A. D. 1916 Term.

No. 274.

In the Matter of TAKAO OZAWA, a Petitoner for Naturalization.

Assignment of Errors.

Now comes the above-named petitioner, Takao Ozawa, and says that in the record and proceedings in the above-entitled cause there is manifest error in this to wit:

1. That the said Court erred in sustaining the objection of the United States District Attorney for

the District of Hawaii to the granting of a naturalization certificate on the ground that the applicant, being a person of the Japanese race and born in Japan, is not eligible to citizenship under Revised Statutes, Section 2169, the petitioner's qualifications in other respects having been found by the Court to be fully established and the same being conceded by the government.

2. That the said Court erred in holding that the term "free white person" as used in such statute cannot include a person of the Japanese race.

3. That the said Court erred in denying a certificate of naturalization and citizenship to the petitioner.

Dated Honolulu, T. H., September 25th, 1916.

(Sgd.) CASTLE & WITHINGTON,
(Sgd.) J. LIGHTFOOT,
Attorneys for Petitioner. [47]

[Endorsed]: No. 274. (Title of Court and Cause.) Assignment of Errors. Filed Sep-23-1916, at 2 o'clock and 10 minutes P. M. George R. Clark, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [48]

In the United States District Court, Territory of Hawaii.

April A. D. 1916, Term.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

CITATION ON APPEAL.

Filed Sep. 23, 1916, at 2 O'clock and 10 Minutes P. M. George R. Clark, Clerk. By Wm. L. Rosa, Deputy Clerk. [49]

In the United States District Court, Territory of Hawaii.

April A. D. 1916 Term.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to the United States of America, and S. C. Huber, Its Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City and County of San Francisco, State of California, within thirty days from the date of this Writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court for the District and Territory of Hawaii, wherein Takao Ozawa is appellant and you are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the

United States of America, this 25th day of [50] September, A. D. 1916, and of the Independence of the United States the one hundred and fortieth.

HORACE W. VAUGHAN,
Judge U. S. District Court, District and Territory of Hawaii.

[Seal] Attest: GEORGE R. CLARK,
Clerk, U. S. District Court.
By Wm. L. ROSA,
Deputy.

Received a copy of the within citation.

S. C. HUBER,
United States Attorney. [51]

In the United States District Court, Territory of Hawaii.

April A. D. 1916, Term.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS that Takao Ozawa, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, U. S., as surety, are held and firmly bound unto the United States of America in the penal sum of five hunded dollars, ($500), for the payment of which well and truly to be made to said United States of America we bind ourselves and our

respective heirs, executors, administrators and successors firmly by these presents.

THE CONDITION of the above obligation is such that

WHEREAS, on the 25th day of September, A. D. 1916, the above bounden principal perfected his appeal to the United States Circuit Court of Appeals of the Ninth Circuit from that certain judgment made and entered in the above-entitled court and cause on the 25th day of March, A. D. 1916, by the Honorable CHARLES F. CLEMONS, Judge of said court.

NOW THEREFORE, if the said principal shall prosecute his said appeal to effect and answer all damages and costs if he fails to sustain his said appeal then this obligation shall be void, otherwise, it shall remain in full force and effect. [52]

IN WITNESS WHEREOF the said Takao Ozawa has hereunto set his hand and seal and the said The United States Fidelity and Guaranty Company, of Baltimore, Maryland, U. S. has caused its corporate name and seal to be hereto signed and affixed this 25th day of September, A. D., 1916.

(Sgd.) TAKAO OZAWA,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Seal] By (Sgd.) H. F. ULRICHS,
Attorney in Fact, Surety.

The foregoing bond is approved.

(Sgd.) HORACE W. VAUGHAN,
Judge, United States District Court, Territory of Hawaii.

[Endorsed]: No. 274. (Title of Court and Cause.) Bond on Appeal. Filed Sep. 23, 1916, at 2 o'clock and 10 Minutes P. M. George R. Clark, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [53]

In the United States District Court, Territory of Hawaii.

April A. D. 1916, Term.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

Acknowledgment of Receipt of Papers on Appeal.

Received a copy of the foregoing Petition for and allowance of Appeal, Assignment of Errors, Citation on Appeal and Bond on Appeal, this 25th day of September, A. D. 1916.

(Sgd.) S. C. HUBER,
United States District Attorney.

[Endorsed]: No. 274. (Title of Court and Cause.) Receipt for Copies. Filed Sep. 23, 1916, at 2 o'clock and 10 Minutes P. M. George R. Clark, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [54]

In the United States District Court, Territory of Hawaii.

April A. D. 1916, Term.

No. 274.

In the Matter or TAKAO OZAWA, a Petitioner for Naturalization.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following, pleadings, proceedings and papers on file, to wit:

1. Declaration of Intention, dated August 1, 1902, taken before the clerk of the Superior Court, County of Alameda, State of California.

2. Petition for Naturalization, filed in the United States District Court for the Territory of Hawaii, on October 16, 1914, with affidavit of petitioner and witnesses attached thereto, also the order of court denying the petition attached thereto.

3. Decision of Honorable CHARLES F. CLEMONS, dated March 25, 1916.

4. Bill of Exceptions, filed August 17, 1916. [55]

5. Petition for an Allowance of Appeal.

6. Assignment of Errors.

7. Citation on Appeal.

8. Bond on Appeal.

9. Receipt for Copies.

10. All Minute Entries in the above-entitled cause.

11. This Praecipe.

Said transcript to be prepared as recorded by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of said Circuit Court of Appeals in San Francisco, on or before the 23d day of October, A. D., 1916.

(Sgd) CASTLE & WITHINGTON,
(Sgd) J. LIGHTFOOT,
Attorneys for Petitioner.

[Endorsed]: No. 274. (Title of Court and Cause.) Praecipe. Filed Oct. 5, 1916, at 9 o'clock and 29 Minutes A. M., (Sgd) George R. Clark, Clerk. [56]

In the United States District Court in and for the District and Territory of Hawaii.

No. 274.

In the Matter of TAKAO OZAWA, a Petitioner for Naturalization.

Certificate of Clerk U. S. District Court, to Transcript of Record.

United States of America,
District of Hawaii,—ss.

I, George R. Clark, Clerk of the District Court of the United States for the District of Hawaii, do hereby certify the foregoing pages, numbered from

1 to 57, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the matter of Takao Ozawa, a petitioner for naturalization, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal and order extending time to transmit record on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is $14.65, and that said amount has been paid by appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 17th day of November, A. D. 1916.

[Seal] GEORGE R. CLARK.

Clerk of the United States District Court, Territory of Hawaii. [57]

[Endorsed]: No. 2888. United States Circuit Court of Appeal for the Ninth Circuit. Takao Ozawa, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed November 29, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2888-2889

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

TAKAO OZAWA,
Appellant,
v.
THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

DAVID L. WITHINGTON,
JOSEPH LIGHTFOOT,
Attorneys for Takao Ozawa,
Petitioner.

CASTLE & WITHINGTON,
LIGHTFOOT & LIGHTFOOT,
Of Counsel.

INDEX

CASES CITED

NO. 2888-2889

United States Circuit Court of Appeals for the Ninth Circuit

TAKAO OZAWA,
Appellant,
v.
THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the District of Hawaii denying the petition for naturalization of the appellant, Takao Ozawa. The petition and affidavits of the petitioner and his witnesses were in due form, and showed his residence in Honolulu, in the Territory of Hawaii; his occupation; his birth in Japan on the 15th day of June, A. D. 1875; his emigration on the 17th day of July, 1894; that he declared his intention before the Superior Court of the County of Alameda, State of California, on the 1st day of August, A. D. 1902; that he is married and has two children, both born in Hawaii; and that he is not a disbeliever in or opposed to organized government

or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that he is not a polygamist nor a believer in the practice of polygamy; that he is attached to the principles of the Constitution of the United States, and renounces his allegiance and fidelity to the Emperor of Japan; that he is able to speak the English language, and has resided continuously in the United States since the 29th day of July, A. D. 1894. (Tr., pp. 5-7.)

The petition for naturalization was opposed by the United States District Attorney on the sole ground that the applicant was "a person of the Japanese race and born in Japan," and therefore not eligible to naturalization under Revised Statutes, Section 2169.

"The other qualifications are found by the Court to be fully established, and are conceded by the Government. Twenty years' continuous residence in the United States, including over nine years' residence in Hawaii, graduation from the Berkeley (Cal.) High School, nearly three years' attendance at the University of California, the education of his children in American schools and churches, the maintenance of the English language in his home, are some of the facts in his behalf. And he has presented two briefs of his own authorship, in themselves ample proof of his qualifications of education and character. (Tr., p. 19.)

THE ISSUE.

The issue made by the United States Attorney and decided by the court is whether "a person of the

Japanese race and born in Japan" is eligible to citizenship under Revised Statutes, Section 2169.

The true issues are:

(1) Is the Act of June 29, 1906, providing for a uniform rule for the naturalization of aliens, as amended, complete in itself, or is it impliedly limited by Section 2169, which in terms does not apply to the Act? and

(2) Whether a Japanese "born in Japan" is eligible to citizenship within the limitations of that section, which, so far as it is applicable to the case at bar, deals, not with races, but with persons.

THE STATUTE.

Title XXX of the Revised Statutes is not the statute under which the proceedings were had. The statute in question is that of June 29, 1906 (34 Stat. L., Part I, p. 596), as subsequently amended, which is entitled:

"An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

This Act is complete in itself and provides, not only the *"uniform rule for the naturalization,"* but the conditions for naturalization. It provides in Section 3:

"That the naturalization jurisdiction of all courts herein specified, State, Territorial, and Federal,

shall extend only to aliens resident within the respective judicial districts of such courts."

and continues:

"Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:"

First. A preliminary declaration of intention must be made at least two years prior to admission by an alien who has reached the age of eighteen years.

"And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United tates, and the present place of residence in the United States of said alien: *Provided, however,* That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration."

Second. A petition in writing be filed, signed and verified, stating full name, residence, occupation, date and place of birth, place from which he emigrated, date and place of arrival in United States, name of the vessel, time and court where he declared his intention, name of wife and country of her nativity, place of residence; name, place, birth and residence of children. He must set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization

teaching disbelief in or opposed to organized government, or a polygamist or believer in polygamy, and his intention to become a citizen and to renounce allegiance to any foreign prince, potentate, state or sovereignty of which he may be a subject.

"and every fact material to his naturalization and required to be proved upon the final hearing of his application."

Provision is also made for affidavits of two credible witnesses who have personal knowledge of petitioner.

Third. He must renounce his allegiance as aforesaid.

Fourth. It must appear to the court that the alien has resided continuously in the United States for five years, and in the Territory for one year, and behaved as a man of good moral character, attached to the principles of the Constitution, and well disposed to the good order and happiness of the same; with the testimony of at least two witnesses on the facts of residence, moral character and occupation; and

Fifth. He must renounce any hereditary title or order of nobility.

By Section 5 the clerk posts in an appropriate place the name, nativity and residence of the alien, with particulars of his arrival in the United States and the date of the final hearing and the names of the witnesses.

Section 7 provides that no one who is a disbeliever

in organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of this Government or any other organized government, or who is a polygamist, shall be naturalized.

Section 8 provides that no alien, with certain exceptions, shall hereafter be naturalized who cannot speak the English language.

By Section 11 the United States has the right to appear, cross-examine, call witnesses, and be heard in opposition.

Section 12 provides for notice to the Bureau of Naturalization, and reports to it.

Section 15 provides for suits to cancel certificates of citizenship on the ground of fraud or where illegally procured, and provides in certain cases what shall be *prima facie* evidence of fraud.

Section 26 provides:

"That sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed."

Section 27 provides the forms for declaration of intention, petition, affidavits and certificates. There is no reference in any of these to race or color, excepting in the declaration of intention, where color is

a part of the personal description with "height, weight, color of hair, color of eyes, and other visible distinctive marks."

The petition for naturalization, which must set forth "every fact material to his naturalization and required to be proved upon the final hearing of his application," contains nothing in reference to color or race.

The final section provides:

"Sec. 30. That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law."

SECTIONS OF TITLE XXX, REVISED LAWS, UNITED STATES, NOT EXPRESSLY REPEALED.

The only sections of Title XXX not expressly repealed are Section 2166 exempting honorably discharged soldiers from a previous declaration of intention, and the necessity of proof of but one year's residence in the United States; Section 2170, pro-

viding for a continuous residence of five years, which seems, however, to be fully covered by that Act (Section 4); Section 2171, prohibiting the naturalization of alien enemies, which section contains the anomaly of supposing that any alien would apply who had made a declaration before June 18, 1812; Section 2174, making provision for the naturalization of aliens who have served three years on a merchant vessel of the United States subsequent to the date of the declaration of intention, and extending the protection of American citizenship to such seamen, although unnaturalized; and Section 2169,

"The provisions of this Title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

SUBSEQUENT ACTS OF CONGRESS.

Subsequent legislation of Congress has no material bearing. This legislation includes: Act of March 2, 1907 (34 Stat. L., pt. 1, p. 1228), providing for the expatriation of citizens and the protection of citizens when abroad; Act of June 25, 1910 (36 Stat. L., pt. 1, p. 830), authorizing the naturalization of aliens who, supposing they were citizens of the United States, had exercised rights as such in good faith, without proof of former declaration; Act of February 24, 1911 (36 Stat. L., pt. 1, p. 929), providing for the naturalization of the widow and minor children of one who declared his intention, and make a homestead entry, without any declaration of intention; Act of June 30, 1914 (38 Stat. L., pt. 1, p. 395),

dispensing in the case of honorably discharged, or discharged with the recommendation of re-enlistment, sailors from the Navy, Marine Corps, Revenue-Cutter Service and the naval auxiliary service, without proof of good moral character and previous declaration; and further authorizing the admission of any such sailor who has completed four years of honorable service without such previous declaration. This Act contains the following proviso:

"Provided further, That any court which now has or may hereafter be given jurisdiction to naturalize aliens as citizens of the United States may immediately naturalize any alien applying under and furnishing the proof prescribed by the foregoing provisions."

the language of which would authorize the naturalization of any alien who came within the foregoing definition. There are also validating acts of no particular importance.

DECISION OF THE COURT BELOW.

It is a little difficult to determine the exact ground on which the court below rests its decision, farther than its finding that "petitioner is not qualified under Revised Statutes, Section 2169." Apparently it is based on the reasoning that this section applies, and that, as laid down by Judge Cushman *In re Young,* 198 Fed. 716, "The term 'white person' must be given its common or popular meaning," and so construed it would include the European races and those Caucasians belonging to races around the Med-

iterranean Sea, and whatever race the Japanese may be, "they are not included in what are commonly understood as 'white persons.'" As the learned Judge added to the Young case a reference to *Dow v. United States,* 226 Fed. 145, 147, it is probable that he arrived at this conclusion on the ground stated in that case, that the statute must be construed in the light of "the more definite and general knowledge and conception which must be attributed to the legislators" of 1870 to 1875.

ARGUMENT.

I.

THIS COURT HAS JURISDICTION OF THE APPEAL.

This cause was contested in the lower court, the United States District Attorney, its authorized representative, appearing and contesting the question involved in this appeal. We may therefore reject the class of cases which hold that a "case," as defined in the Court of Appeals Act giving jurisdiction to this court in appeals from final decisions, is confined to a contested proceeding.

The question has never been passed upon in this circuit, has never been decided by the Supreme Court of the United States, but has been decided adversely to the right of appeal in the Sixth Circuit.

United States v. Dolla, 177 Fed. 101.

And this has been followed in the Third Circuit, chiefly on the ground of conformity.

United States v. Neugebauer, 221 Fed. 938.

There are also some expressions, not necessary for decision, in a case in the Second Circuit in which the majority held that a proceeding to cancel a naturalization certificate would lie, although at the original hearing a representative of the Bureau of Naturalization appeared and contested the proceeding on the same ground, the court, however, holding that he did not represent the United States, that he was not a law officer, and referred incidentally to *United States v. Dolla,* ubi supra, and *United States v. Neugebauer,* saying, however:

"And the question is not now before us, and we express no opinion one way or the other concerning it."

Judge Hough, dissenting, held that the court in numerous cases, since the Dolla case, cited by him, had assumed jurisdiction, saying:

"There was no difficulty in reviewing this naturalization order by an appeal from a chancery decree."

United States v. Mulvey, 232 Fed. 513.

Proceedings similar to that in *United States v. Mulvey* have been before the Supreme Court of the United States in two cases. In the latter of these cases it was held that the proceeding to cancel the certificate was equitable in its nature, that it applied to certificates of naturalization issued under Title XXX of the Revised Laws, as well as under

the Act of 1906, that it was a beneficent provision, and a distinction is clearly made between the Act of 1906 and "the naturalization laws preceding the Act of 1906."

Luria v. United States, 231 U. S. 9.

In the earlier case the original petition for naturalization was also not contested, and the naturalization papers were issued prior to the Act of 1906. In that case Mr. Justice Pitney, after citing the opinion of Chief Justice Marshall that the judgment of a court on the question of naturalization

"was like every other judgment, complete evidence of its own validity. *Spratt v. Spratt,* 4 Pet. 393, 408."

held that Congress nevertheless was authorized to make a direct attack in case of fraud or illegality in a case where no issue had been raised in the original application, saying, however:

"What may be the effect of a judgment allowing naturalization in a case where the government has appeared and litigated the matter does not now concern us. See 2 Black, Judgm., Sec. 534a. What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the government, and without opportunity, to say nothing of duty, on the part of the government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship."

citing 2 Black, Judgm., Secs. 500, 504, and citing Mr. Justice Harlan in *Southern P. R. Co. v. United States,* 168 U. S. 1, 48, that it is a right, question, or

fact distinctly put in issue and directly determined to which the doctrine of *res judicata* applies, and holding that a certificate of naturalization procured *ex parte* in the ordinary way was open to attack as a public grant of land or a patent for an invention; and citing the opinion of Judge Cross in *United States v. Spohrer,* 175 Fed. 440, as pertinent:

"An alien friend is offered, under certain conditions, the privilege of citizenship."

and again, to the effect that the government, when authorized by Congress, has the right to recall

"where it has conferred a privilege in answer to the prayer of an *ex parte* petitioner."
Johannessen v. United States, 225 U. S. 227.

United States v. Dolla, ubi supra, has been criticized in a very able opinion by Judge Amidon in the District Court of the United States for North Dakota in a proceeding to cancel a certificate of citizenship, in which he reviews the history of the passage of the Act of 1906, holding, and in this he is sustained by other decisions, that "'illegally procured' imports, not an error of court, but willful misconduct," and citing numerous cases from the Second, Fourth, Third, Seventh and Eighth Circuits in which, since the decision in the Dolla case, errors committed in the exercise of the jurisdiction to naturalize have been corrected on appeal; citing also the well-known definition of "a case" by Mr. Justice Field (32 Fed. 255), and citing a case of deportation under the im-

migration laws in which the Supreme Court has said:

"When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant and a judge—*actor, reus, et judex.*"

Fong Yue Ting v. United States, 149 U. S. 698, 728.

and concluding that an error of the court, not brought about by any fraud or deception, is not an illegal practice and does not come within Section 15 of the Act of June 29, 1906.

United States v. Lenore, 207 Fed. 865.

This court has exercised its jurisdiction on a similar appeal from the same District Court.

United States v. Rodiek, 162 Fed. 469.

To the cases cited by Judge Amidon can be added:

United States v. George, 164 Fed. 45 (Second Circuit).

United States v. Cohen, 179 Fed. 834 (Second Circuit).

Yunghauss v. United States, 218 Fed. 168 (Second Circuit).

Dow v. United States, 226 Fed. 145 (Fourth Circuit).

Harmon v. United States, 223 Fed. 425 (First Circuit).

United States v. Peterson, 182 Fed. 289 (Eighth Circuit).

Little needs to be added to the convincing opinion of Judge Amidon that the conclusion in *United States v. Dolla* is wrong.

It has been settled law since the rule laid down in the Supreme Court by Chief Justice Marshall that

"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity."

Spratt v. Spratt, ubi supra.

This doctrine has been consistently sustained by that court down to and including the Johannessen case cited above.

The fact that the action of a court upon a naturalization petition is a judgment and has all the conclusive effects of a judgment had been held much earlier.

Stark v. Chesapeake Insurance Co., 7 Cranch 420.

Campbell v. Gordon, 6 Cranch 176.

The proceeding for naturalization is a judicial proceeding in a court.

Thomas v. Loney, 134 U. S. 372.

Hogan v. Kurtz, 94 U. S. 773.

The authority of Congress is exercised "by enabling foreigners individually to become citizens by proceedings of the judicial tribunals."

United States v. Wong Kim Ark, 169 U. S. 649, 703.

The whole question has been exhaustively considered and decided by that court in a case affirming a judgment of this court, in which it was held that the Constitution gave power to confer jurisdiction upon the courts of a State and incidentally on the courts of the United States in naturalization matters, and that this had been done.

Holmgren v. United States, 217 U. S. 507.

By the Constitution, Article 3, Section 2, it is provided:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made * * * to controversies to which the United States shall be a party."

and it has been settled by a long line of decision

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner."

and that Congress cannot enlarge the right given by the Constitution in the section quoted.

"As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this

it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

"What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'? A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury v. Madison,* 1 Cranch 137, 2 L. ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

" 'The judicial article of the Constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only civil suits of a civil nature. *Chisholm v. Georgia,* 2 Dall. 431, 432, 1 L. ed. 445, 446; 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of action upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."

Muskrat v. United States, 219 U. S. 346, 356, 357.

The case at bar is not only a case but a controversy, and in either event the language of the Court of Appeals Act must be held to use the word "case"

in the sense in which the Constitution uses it in the section granting the power to Congress to enact that Act.

The judicial power is only exercised in the decision of cases.

Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421.

in which it is supreme over the legislative power.

United States v. Klein, 13 Wall. 128.

As the action of the United States Court in naturalization matters is judicial, and as Congress cannot extend the judicial power beyond the right given by the Constitution which extends only to cases and controversies, and as the word "case" includes a controversy, and as this court is given jurisdiction by the Court of Appeals Act in cases in the United States District Court of Hawaii, as well as in other district courts, there can be no question but what the Dolla case is an ill-considered decision and that this court has jurisdiction. The Supreme Court of the United States, indeed, seems to have gone beyond this, for although the court in *Johannessen v. United States,* ubi supra, refrains from deciding the question whether an action would lie under Section 15 of the Act of 1906 to cancel a judgment of naturalization, where the United States had appeared and litigated the question, the citation in the opinion by Mr. Justice Holmes of Black on Judgment, Section 534a, which lays down the rule that if the United States appears and litigates a question in a case it is for-

ever estopped by the judgment, unless it procures its reversal on appeal, strongly indicates the opinion of that court.

It is immaterial in the consideration of this case whether the review is by appeal or writ of error, as, by stipulation, case No. 2889 is to be heard and determined on the printed record in this cause, and the cases are consolidated for hearing and one brief filed covering both cases.

II.

THE ACT OF JUNE 29, 1906, ESTABLISHES A UNIFORM RULE OF NATURALIZATION, AND THAT RULE IS NOT CONTROLLED OR MODIFIED BY SECTION 2169.

(a) *The constitutional grant of power, the title of the Act and its scope show that it is a complete and exclusive rule, save in definitely excepted cases, for naturalization.*

The Constitution of the United States provides, Article I, Section 8:

"The Congress shall have Power * * *
"To establish an uniform Rule of Naturalization * * *
"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * *

Congress exercised this power in the first Congress, in its second session, and passed the Act of March 26, 1790 (1 Stat. L. 103), entitled:

"An Act to establish an uniform rule of naturalization," This Act was repealed by a like Act with a like title in 1795, and that by the Act of April 14, 1802 (2 Stat. L. 153), which in turn was entitled:

"An Act to establish an uniform rule of naturalization." This in turn became Title XXX of the Revised Statutes of the United States, which comprised the uniform rule of naturalization until the passage of the Act of June 29, 1906, which purports to be and is entitled:

"An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

To recapitulate, the Constitution grants to Congress the power "To establish an uniform Rule of Naturalization." The various Acts of Congress which have exercised this power from the Act of the first Congress, March 26, 1790, have been and have purported to be Acts "To establish an uniform Rule of Naturalization." The Act of June 29, 1906, purports to be an exercise of the power granted by the Constitution, and purports to be an exhaustive exercise of that power and is complete in itself.

As was said by the Supreme Court of the United States in construing an Act defining the jurisdiction of the Supreme Court, which jurisdiction is granted by the Constitution:

"The Constitution and the laws are to be construed together."

Durousseau v. United States, 6 Cranch 307.

And as was said by that court in the Wong Kim Ark case:

"The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as it respects the individual."

United States v. Wong Kim Ark, ubi supra, p. 703.

It is also a well settled rule that an Act is to be construed as a whole and every part of it considered in order to find its scope and purpose.

This Act appears to be a complete Act. It provides in Section 3 for exclusive jurisdiction of naturalizing aliens, in Section 4,

"that an alien may be admitted to become a citizen of the United States in the folowing manner, *and not otherwise,*"

which is followed by five paragraphs prescribing the conditions of admission, among which, in paragraph two, is that the petition shall set forth

"every fact material to his naturalization and required to be proved upon the final hearing of his application."

and by Section 27 the form of this petition is given, containing the allegations which Congress believed were "material to his naturalization and required to be proved," and in this there is nothing with reference to color or race.

The intent of Congress to enact a uniform rule, and that it had enacted a uniform rule, for naturalization, covering the entire subject and even giving to

the rules and regulations the force of law, has been recognized.

In re Brefo, 217 Fed. 131.

(b) *The unrepealed sections of Title XXX provide for the naturalization of cases excepted from the uniform law.*

An examination of the sections of Title XXX of the Revised Laws of the United States, not expressly repealed by Section 26 of the Act of June 29, 1906, show nothing inconsistent with this view. Section 2166, which is a reenactment of the Act of July 17, 1862, provides for the admission of an exceptional class, namely, honorably discharged soldiers, without previous declaration. Section 2169 is limited in its application to the Title, of which it is a part. Section 2170, not expressly repealed, is *functus officio,* as its provisions are covered by the naturalization act of June 29, 1906, Sections 4 and 10. Section 2171 merely forbids the naturalization of alien enemies, except in certain instances, an instance the impossibility of which should have led to the repeal or modification of the section; and Section 2174 makes an exception in the case of alien seamen on merchant vessels and authorizes their admission after three years' service with good conduct, and declares them to be citizens so far as the merchant service is concerned after three years and entitled to protection after the declaration of intention.

Although the decision by Judge Ward in a case in the Circuit Court for the Southern District of New

York may be doubtful law, the language of his opinion in a case arising under Section 2166 is worthy of quotation:

"Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of Section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by Section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary were not required. This would be natural as to applicants who had actually beeen in the service of the United States and as to whose good character the officers of the United States had certified."

In re Loftus, 165 Fed. 1002.

And this language has been adopted with approval by Judge Orr in the Western District of Pennsylvania.

In re Leichtag, 211 Fed. 681.

So far as the law of these cases is concerned, the view taken by the Circuit Court of Appeals of the Eighth Circuit would seem to be the correct one, although that applies to the allied case of soldiers, to which we will later refer, in holding that a right is granted to these excepted classes, but subject to all the restrictions for admission imposed by the uniform rule laid down in the statute of June 29, 1906, the court saying of that Act:

"The language there employed is comprehensive and emphatic. A 'uniform rule' is provided. 'An alien' may be admitted to citizenship in the manner prescribed, 'and not otherwise.'

"A wise public policy undoubtedly inspired the enactment of this law. Its intent, gathered from the unambiguous language employed, subjects all aliens to a public, drastic, and thorough examination touching their qualifications for citizenship before that priceless boon is conferred upon them. It is not our province to thwart this public policy by reading unwarranted or doubtful exceptions into the act."

United States v. Peterson, ubi supra, p. 291.

This view is emphasized by a number of decisions which hold that where there is an express direction of some unrepealed section of Title XXX, as, for instance, that one witness shall be sufficient, that command must be followed, and that the uniform rule does not apply to the specially excepted cases still provided in that Title.

In re Tancrel, 227 Fed. 329.

In re Loftus, ubi supra.

United States v. Lengyel, 220 Fed. 720.

In re Sterbuck, 224 Fed. 1012.

(c) *Section 2169 in terms is applicable to the excepted cases of Title XXX, and not to the uniform law provided by the Act of June 29, 1906.*

There is nothing in Section 2169 of the Revised Laws which either in terms or in spirit makes it applicable to the Act of June 29, 1906, which carries out the constitutional provision of establishing a uniform rule. Section 2169 in terms merely declares

the applicability of the provisions of Title XXX to certain classes of aliens. There is nowhere in the laws of the United States any declaration that a Japanese shall not be admitted to citizenship, nor is there any existing declaration from which this can be directly inferred. It has been inferred from the fact that Congress made the provisions of the Title in regard to naturalization apply specifically "to aliens being free white persons and to aliens of African nativity and to persons of African descent." There is nothing in this expression which is necessarily restrictive; it is only inferentially so. As a matter of fact, when the Revised Laws were passed in 1873 the section read:

"Sec. 2169. The provisions of this Title shall apply to aliens of African nativity and to persons of African descent."

which at best is an enlarging and not restrictive declaration that persons coming within these definiitons are entitled to naturalization, apparently thought necessary since they were formerly expressly excluded under Acts which provided specifically what aliens were eligible to naturalization. In the Act to correct errors the words ("being free white persons and to ailens") are inserted and the provision left as it stands at present. No argument can be drawn from the language used to show that the intention of Congress by this amendment was to *restrict* naturalization to free white persons. The argument which has been used to sustain that theory

is not drawn from the language, but from the previous history of legislation; but the previous history of all the legislation was that the declaration was found not in making the Act applicable to certain persons, but providing "an uniform rule of naturalization" that "*any alien being a free white person*" might be naturalized, and not making any provision for the naturalization of any alien who is not a free white person. That this was the view of Congress, and that it thought affirmative legislation was necessary to exclude the Chinese from citizenship, is shown by Congress passing the Act of May 6, 1882, which provides:

"Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and *all laws in conflict with this act are hereby repealed.*"

To hold that Section 2169 is a restriction on the Act of June 29, 1906, which provides for a "uniform rule for the naturalization of aliens," requires not only the inference of a prohibition of the naturalization of other than free white persons and those of African nativity or descent from words which contain no such prohibition, but also to make a section which declares that "*the provisions of this Title shall apply*" to a restricted class of aliens, declare that the *provisions of the Act of June 29, 1906,* shall apply only to the same restricted class of aliens; not only converts that which is in terms an extension of the meaning of the Act into a restriction, but also in-

corporates into a general law, purporting to contain the entire uniform and general rule for naturalization, a provision which is in, and restricted in terms to, a title in another Act, which Act and which title have not been repealed. The more reasonable supposition is that Congress intended to retain Section 2169 as a limitation on the specially excepted classes provided for in the unrepealed sections in Title XXX, and that the general rule provided for in the Act of June 29, 1906, applied to all other aliens and was not to be restricted, excepting as provided in that Act. These conclusions, drawn from the general scope of the Act, are reinforced by the express language of the Act of June 29, 1906, which declares, in the language contained in the previous general Act,

"Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and *not otherwise.*"

and then proceeds to provide for *all* the conditions of admission and for a petition setting forth "*every fact material to his naturalization and required to be proved,*" and then gives a form for the petition which contains no fact showing that the applicant is a free white person or that he is of African nativity or African descent.

(d) *The history of Section 2169 and subsequent legislation and decision is inconsistent with the view that it is a restriction on the general terms of the Act of June 29, 1906.*

In another part of this brief we shall deal with the decisions construing Section 2169, and show, as we think, that very little aid can be drawn from these numerous decisions on the point in question, and that in fact, with conspicuous exceptions, they are no more creditable to the judiciary than is the law itself to Congress. The privilege of naturalization is one which has been said by the courts and by statesmen to be a privilege which America has sought to extend to immigrants from other nations in a friendly and a generous spirit; and yet America has had on her statute books since 1875, if the decisions which affirm that Section 2169 is restructive of th Act of June 29, 1906, are sound, a provision which has no meaning according to the ordinary acceptation of language and which is insusceptible of any satisfactory judicial construction. It has been held that the term is to be interpreted in the light of its first enactment in 1790, and again that it is to be construed, as the learned judge construed it in this case, in the light of the common and popular meaning at the time of its incorporation in the present form in Title XXX of the Revised Statutes, and neither line of decision has considered the marked change of language between the original Act, which limited naturalization to free white persons, and the language of Section 2169, which inserted those words in the provision which has been held to be sufficient to admit any alien of any color and race in 1874 and 1875.

In re Ah Chong, 2 Fed. 733.
United States v. Balsaro, 180 Fed. 694.
Dow v. United States, 226 Fed. 145.
In re Akhay Kumar Mozumdar, 237 Fed. 115.

If the naturalization of aliens was restricted to free white persons and those of African nativity and descent after the passage of the amendatory Act of 1875, then between 1874 and 1875 it would be restricted to those of African nativity or descent, which is incredible. The truth of the matter is that Congress at that time was not willing to place itself on record as to what aliens it would admit to citizenship and what it would not, although perhaps having the Chinese in mind, and the courts, with the rising tide of prejudice, have construed the language of the statute, not in the light that surrounded its enactment, but in the light of a prejudice which, as to the Japanese at least, did not exist at the time of the passage of the statute.

As we have already said, that Congress itself and those promoting the anti-Chinese propaganda distrusted the language is shown by the enactment of the law of May 6, 1882. We shall show also that the term "free white persons" has been construed in some cases to create a distinction of race, in others a distinction of color, in still others a distinction of locality, and here again with no agreement as to locality; and that this was the condition of the law when the Act of June 29, 1906, was passed. Is it reasonable to suppose that Congress at that time,

just after the Japanese-Russian war and the treaty of Portsmouth, at the very crest of the wave of Japanese and American friendship, would have enacted a law intending to affront one of the most sensitive, warlike and progressive nations on the face of the earth by declaring that its members were not fit for American citizenship, and is it not equally inconceivable that Congress in 1906 dodged the issue? It is only necessary to refer to the recent debates in Congress on the passage of the Immigration Bill, when it was again and again declared in Congress that there was no intention to discriminate against Japanese immigration, and the most sedulous efforts were made to preserve the bill from any appearance of offense to Japan.

(e) *The decided cases in the Federal courts, appearing to so hold, do not in fact hold Section 2169 applicable to the Act of June 29, 1906, and the cases cited to this point are not decisive of it.*

Let us briefly examine the cases in which it appears to be held that Section 2169 is a restriction on the Act of June 29, 1906, and here it is important to observe that all the cases treat the question as one of an implied repeal of that section, whereas the true question is whether the Act is not what it purports to be, the uniform and complete rule provided by the Constitution for the ordinary case of naturalization, and whether, if it be such a uniform and complete rule as the Constitution contemplated, Section 2169 would apply.

The question of the repeal of that section first arose in *Bessho v. United States,* 178 Fed. 245, where a Japanese petitioned, not under the Act of June 29, 1906, but under the Act of July 26, 1894. He was therefore one of the excepted classes. There can be no doubt that the Act of July 26, 1894, at the time of its passage was limited by Section 2169, and the only question which could arise was whether the section was impliedly repealed by the Act of June 29, 1906, and concerning this the court say:

"By this legislation a new and complete system of naturalization was adopted, all of the details of which together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed. In Section 26 of that act is found an express repeal of Sections 2165, 2167, 2168, and 2173 of the Revised Statutes (U. S. Comp. So. Supp. 1909, p. 488). These repealed sections are all included in Title 30 of said Revised Statutes, and demonstrate beyond doubt that the Congress carefully considered all of the provisions of that title, and that it intended that the unrepealed sections thereof should still remain in force. Among those unrepealed is Section 2169, which we thus find to be virtually re-enacted, and declared to be one of the rules under which future naturalizations are to be conducted. Another part of that title not repealed is Section 2166, which relates to aliens who have enlisted in the armies of the United States, and provides that, an alien, of the age of 21 years and upward, who has enlisted, or may enlist, in the armies of the United States, and has been, or may be thereafter, honorable discharged, shall be admitted to become a citizen of the United States, upon his petition, under certain conditions therein mentioned. This section is quite similar to

the Act of 1894, providing for the naturalization of aliens who have enlisted in the navy—the act under which the appellant applied—which last-mentioned act is also left in full force and effect by the Act of June 29, 1906.

"In the light of this legislation, showing as it does the plain intention of the law-making power, must not the courts, under the usual rules of construction, hold that Section 2169 of the Revised Statutes restricts the provisions of the enactments authorizing aliens who have enlisted in the navy, and in the army, to be admitted as citizens of the United States?"

Bessho v. United States, ubi supra.

United States v. Balsaro, ubi supra, comes a little nearer in its language, but in that case the order admitting a Parsee was affirmed, and what is said on the question of the implied repeal of Section 2169 is *obiter dictum.* It is assumed that the Act of June 29, 1906, is a part of Title XXX of the Revised Statutes of the United States. The requirement as to the allegations of the petition is not referred to and what is said about color in the declaration of intention overlooks the requirement that color should be shown "as a visible distinctive mark" to identify the petitioner for naturalization, and that the color is not required to be set forth in the petition as a material fact.

In re Alverto, 198 Fed. 688, merely cites *United States v. Balsaro* as authority to the point.

Summing up these cases, the Bessho case decides nothing in regard to the Act of June 29, 1906. It deals with the limitation on the excepted classes, and

the Act of July 26, 1894, which is said to be similar to Section 2166, which is not repealed, and, being a part of the title, would be controlled by Section 2169. What is said in the Balsaro case is dictum, and dictum of the hasty and ill-considered sort; and Thompson, District Judge, in the Alverto case does not even discuss the point and simply cites the dictum in the Balsaro case as decisive. It might be added of the Alverto case that the petitioner in that case relied on the Act of July 26, 1894, and sought to bring himself within the excepted classes. The petitioner also claimed under Section 30 of the Act of June 29, 1906.

It might be well to add that *In re Alverto* is inconsistent with the opinion of Attorney General Bonoparte, July 10, 1908, with the decision of Mr. Justice Gould, of the Supreme Court of the District of Columbia, December 13, 1915, *In re Monico Lopez,* from which no appeal was taken by the Department of Justice on the ground, in part, that in the Alverto case the applicant had not shown himself to be a resident at all, and also with the decision of the learned Judge below, March 25, 1916, on the petition of Marcus Solis. Judge Vaughan, of the same court, has since taken an opposite view in the case of Ocampo, decided December 30, 1916, and also District Judge Hand in the Southern District of New York *In re Lampitoe,* 232 Fed. 382.

(f) *The related cases in this court are inconsistent with Section 2169 being applicable to the Act of June 29, 1906.*

There are two cases in which this point came more or less incidentally before this court. In the Rodiek case the court had reason to construe the Act of June 29, 1906, and determined that it was a uniform Act and impliedly repealed that section of the Organic Act of the Territory of Hawaii, the Act of April 30, 1900, which provided that aliens who had resided for five years in Hawaii could be naturalized without the preliminary declaration of intention, and the court said:

"But we think that, in the present case, the intention of Congress to repeal the special law is manifest. The title of the act is indicative of the purpose to establish a uniform rule of naturalization throughout the United States. The terms of Section 4 explicitly provide that naturalization cannot be had otherwise than by first making a declaration of intention two years prior to admission, and the repealing section of the act expressly repeals all acts or parts of acts inconsistent with or repugnant to its provision. The special act dispensing with the declaration of intention in the Territory of Hawaii was clearly inconsistent with Section 4 of the Act of June 29, 1906. There is no reason to presume that in enacting the later statute Congress intended to make any special provision for the naturalization of residents of Hawaii. They were not a distinct class of residents of the United States. There was no reason for bestownig special privileges upon them, as in the case of discharged soldiers and seamen, and they were under no disability to make declarations of their intention to become citizens. We think the intention was to adopt a new scheme of procedure in naturalization, and to make it uniform throughout the United States, and to provide for no exception as to any portion or section of the geographical territory subject to the authority given to

In other words, that fraud or illegality must be shown. This court speaks of the Act of June 29, 1906, in contrast to the Revised Statutes, as "the new law."

United States v. Rockteschell, 208 Fed. 530.

(g) *A comparison of the legislation in reference to immigration, including the recent Act, shows that the policy of Congress is to exclude undesirable citizens and the Chinese, and that Congress has industriously refrained from any action placing or tending to place the Japanese in the same class with the Chinese.*

Immigration precedes naturalization in natural and logical order. The same reasons which would tend to restrict one operate on the other.

Up to the time of the adoption of the Revised Statutes, by treaties and statutes, the immigration of aliens had been encouraged, with one exception, the alien Act of June 25, 1798, which was largely instrumental in sweeping the Federals from office and bringing in the Republican administration of Jefferson. That Act "has ever since been the subject of universal condemnation" (Mr. Justice Field in *Fong Yue Ting v. United States,* ubi supra).

Since the passage of the Revised Laws, various Acts have limited immigration, finally culminating in the Act of February 5, 1917. The earliest, that of March 3, 1875 (18 Stat. L., p. 477), is a limitation on the importation of women for immoral purposes, the supplying of coolie labor, and the entrance of

alien persons under sentence for felonious crimes other than political.

By the Act of August 3, 1882 (22 Stat. L., p. 214), convicts, lunatics, idiots or persons unable to take care of themselves were forbidden admission.

By the Act of February 26, 1885 (23 Stat. L., p. 332), amended February 23, 1887 (24 Stat. L., p. 414), Congress reversed the policy of the United States, initiated by President Lincoln during the war, and prohibited the introduction of contract labor.

By the Act of March 3, 1891 (26 Stat. L., p. 1084), there were added to the prohibited classes, paupers, persons suffering from a loathsome or dangerous contagious disease, and persons who had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also assisted immigrants.

By the Act of March 3, 1903 (32 Stat. L., p. 1213), there were added epileptics, persons who had been insane within five years or who had had two or more attacks, professional beggars, anarchists, prostitutes, procurers, and those previously deported.

A comparison with the requirements for naturalization made in the Act of June 29, 1906, shows that Congress had in mind to exclude from naturalization the same classes who were denied admission under the immigration law, with the exception of those suffering from physical infirmities, these requirements as against physical infirmities acquired

in this country being not applicable in case of naturalization.

An examination of the laws in regard to race exclusion shows that numerous Chinese exclusion Acts have been passed: May 6, 1882 (22 Stat. L., p. 58), July 5, 1884 (23 Stat. L., p. 115), September 13, 1888 (25 Stat. L., p. 476), May 5, 1892 (27 Stat. L., p. 25), November 3, 1893 (28 Stat. L., p. 7), June 6, 1900 (31 Stat. L., p. 588), March 3, 1901 (31 Stat. L., p. 1093), April 29, 1902 (32 Stat. L., p. 176), and April 27, 1904 (33 Stat. L., p. 394). The two latter Acts extend exclusion to the island territory under the jurisdiction of the United States, but do not forbid the passage from one island to another, and provide for Chinese laborers, other than citizens, obtaining a certificate elsewhere than in Hawaii. In none of these laws is there any reference to any other nationality than Chinese.

In Hawaii, by the joint resolution of July 7, 1898 (30 Stat. L., p. 751), further immigration of Chinese into the Hawaiian Islands was prohibited, and no Chinese was allowed to enter the United States from the Hawaiian Islands; and by the Organic Act of April 30, 1900 (31 Stat. L., p. 141), the Chinese were required to procure certificates under the Act of May 5, 1892.

The Act of March 3, 1891, committed to the Commissioner General the enforcement of the Chinese exclusion Act, while the Act of March 3, 1893, provided that it should not apply to Chinese persons,

and the 36th section of the Act of March 3, 1903, contains this provision:

"Provided, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration, or exclusion of Chinese persons or persons of Chinese descent."

This was inserted in order to preserve those laws from repeal (24 Op. Atty.-Gen. 706).

"The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese."

United States v. Wong You, 223 U. S. 67.

In re Dow, 213 Fed. 355.

There is no line in any statute before or since 1875 which indicates any intention on the part of Congress to put the Japanese into the class with immoral, insane and other undesirable immigrants, or to class the Japanese with the Chinese. We have traced the course of legislation along these two parallel lines and endeavored to show that the legislative mind ran in each case in the same course, and that there is no trace of any intention to exclude the Japanese from admission or from naturalization.

The Supreme Court of the United States, in reviewing the history of the immigration Acts, has held that the purpose of applying these prohibitions against the admission of aliens is to exclude classes (with the possible exception of contract laborers)

who are undesirable as members of the community, even if previously domiciled in the United States.

Lapina v. Williams, 232 U. S. 78.

(h) *This view is enforced by the existing treaty with Japan.*

By the treaty with Japan of March 21, 1895 (29 Stat. L., p. 849),

"the citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property."

and this was held by the Supreme Court of the United States not to apply to an alien who was a pauper or likely to become a public charge, holding

"That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country";

the appellant coming under the latter class.

Yamataya v. Fisher, 189 U. S. 86.

This treaty is still in force, but in April, 1911, a new treaty, dealing solely with commerce and navigation, was negotiated. *Each treaty contains the favored nation clause.*

Nothing could more clearly show the distinction made between Japanese and Chinese as to naturalization than that the *only limitation* on the rights of Japanese aliens in this country under the treaty

of March 21, 1895, is the stipulation that the rights given

"do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

Yamataya v. Fisher, 189 U. S. 86.

while the Chinese treaty of December 8, 1894, provided that Chinese

"either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens.*"

This has been held in an opinion by Judge Morrow, then District Judge, to make void, in connection with the Act of Congress of May 6, 1882, forbidding the naturalization of Chinese, a certificate of naturalization to a Chinaman.

In re Gee Hop, 71 Fed. 274.

(i) *The immigration Act of February 5, 1917, and the circumstances of its passage in Congress show the clear intention of that body to make no declaration that Japanese are excluded from naturalization.*

The immigration Act of February 5, 1917, and its discussion in Congress show that Congress has no intention of placing the Japanese in a class with the

Chinese. That bill expressly excepts Japan from its provisions by a territorial limitation, and this was done in deference to the Japanese Government. (See correspondence between Senator Phelan and Secretary of Labor Wilson, Congressional Record, December 13, 1916, p. 266.) That bill, as it came from the House, while making some small changes in excluded persons, particularly those afflicted with tuberculosis, was chiefly marked by two additional grounds of exclusion: one, the provision for which three presidents of the United States had vetoed similar Acts, the requirement that aliens over sixteen years of age, physically capable of reading, who cannot read the English language or some other language or dialect, should be excluded, which finally became the law over the veto of President Wilson; the other, the inclusion in the excluded classes of:

"Hindus and persons who can not become eligible, under existing law, to become citizens of the United States by naturalization, unless otherwise provided for by existing agreements as to passports, or by existing treaties, conventions, or agreements or by treaties, conventions, or agreements that may hereafter be entered into." (Congressional Record, p. 164.)

To this clause the Japanese Government objected, and the State Department requested the bill to be amended (Congressional Record, Dec. 11, 1916, p. 165; and p. 235, Senator Lodge), and the bill was amended as follows:

" * * * unless otherwise provided for by existing treaties, persons who are natives of islands not

possessed by the United States adjacent to the Continent of Asia, situate south of the twentieth parallel latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north, and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States."

Numerous amendments were offered to this clause. The southern senators endeavored to exclude immigration of Negroes, particularly from the West Indies; the members from the Pacific coast to exclude the Orientals. All amendments were voted down, the west not voting with the south on the Negro, and the south not voting with the west on the Asiatic.

There are frequent tributes in the debate to the Japanese nation; among others that Japan has control of the Pacific Ocean, is a great naval and military power. (Senator Gallinger, p. 285.)

"As a matter of fact, I believe that Japan is one of the most efficient as well as one of the most powerful of nations. I recognize her great intelligence, I recognize her great efficiency in whatever walk of industrial life they seek to enter." (Senator Chamberlain, p. 226.)

"I have never claimed, neither do the people of the Pacific coast claim, that the Japanese are an inferior race." (Senator Works, p. 228.)

"The Japanese feel that they are equal; in fact, they feel that they are our superiors, and in many respects they are. They are able, fit, thrifty, and shrewd." (Senator Lane, p. 231.)

"There are some 14,000,000 negroes in the South. They are spreading themselves all over the United States. Everybody admits that they are an inferior race to the Japanese.

" * * * The Senate has today and yesterday voted down half a dozen amendments to this bill to exclude negroes from immigration into the United States. Neither the Independent Senator from the State of California nor the Democratic Senator will dare to say that the Japanese are inferior to negroes, and yet we got no help. We asked for bread, and you gave us a stone. You are not willing to vote to exclude negro immigration from the West Indies."

"You stand around and smile and risk international complications with Japan on a race issue about the Japanese, who are as highly civilized as you are.

" * * *

"The Japanese are not a race of barbarians; they are not a race of veneered men; they are a race of people who have proven their ability to stand in the front ranks of civilization." (Senator Williams, pp. 388, 389.)

In the course of the debate, there are frequent statements that Japanese are ineligible to citizenship, but (pp. 234, 235) *Congress evidently did not know whether the Japanese were excluded or not.* Senator Lodge (p. 234) said:

"The only change from that bill which was vetoed (by President Wilson) was the insertion of the word 'Hindus'—'Hindus and persons who can not become eligible under existing law.' The purpose of that was to exclude Asiatic immigration, Mongols having been held by the courts to be not eligible to naturalization."

but he goes on to say that this form of words was extremely offensive to Japan. Senator Norris pushed Senator Lodge with the question why Japan objected to the language; they were either included or not included, either eligible or not ligible; and Senator Phelan asked, apropos of an amendment (not appearing in the enacted law) in which "white persons" were added to the various status and occupations not excluded, what was meant by "white persons," saying that the Hindus claim, in naturalization proceedings, to be white persons of the Aryan race, to which Senator Lodge assented, saying:

"Well, by the use of the expression 'white persons' you have no protection whatever under the naturalization law" (p. 234);
"that is not defined" (p. 334).

"Mr. Phelan. The Japanese claim that they are white persons; the Hindus claim that they are white persons. It is a very dangerous proposition."

"Mr. Lodge. Yes; they claim it, but it has not been so held. I think it is a danger involved in the naturalization law, which is the foundation of the whole thing" (p. 234).

"Mr. Lodge. Nobody has ever claimed that Mongolians were of the white race."

"Mr. Phelan. The Japanese dispute that they are Mongolians."

"Mr. Lodge. They may do so, but it has never been held by our courts that they were white" (p. 235).

"Mr. Nelson. Would it not be more accurate, instead of saying 'white persons,' to say 'persons of the white race'? Would not that be more exact and more comprehensive, and is not the expression 'white persons' ambiguous?"

"Mr. Lodge. I think the expression 'white persons' is more explicit, because when that expression is used it becomes a pure question of color, and you lose the ethnic distinction entirely. I am not sure that the employment of the term 'white persons' might not get us into some difficulties elsewhere, but 'white race' is not a scientific definition at all. The difficulty lies in trying to accomplish what is sought to be accomplished without using names. We are trying to avoid that" (p. 235).

In the Conference Committee the phrase "white persons" was deleted. From this it appears that the Japanese Government and the State Department and Congress deleted the provision in reference to persons who are not eligible to naturalization lest it should be an implied recognition that the Japanese might not be eligible, and that Congress fully understood that under existing law it was the Mongolians who were intended to be excluded, and that the Japanese claim not to be Mongolians, but white persons within the existing law.

In this connection it is worth noting that among the Acts which are not repealed, altered or amended by this Act are all Acts relating to the immigration or exclusion of Chinese, among which Acts is the Act of May 6, 1882, forbidding naturalization of Chinese.

It thus affirmatively appears that Congress refused, at the request of the Japanese Government, to put into law an implied recognition that the Japanese are excluded from citizenship.

III.

SECTION 2169, IF APPLICABLE TO THE ACT OF JUNE 29, 1906, MUST BE CONSTRUED AS MEANT IN THE ACT OF MARCH 26, 1790, AND, SO CONSTRUED, "FREE WHITE PERSONS" MEANS ONE NOT BLACK, NOT A NEGRO, WHICH DOES NOT EXCLUDE JAPANESE.

(a) *Section 2169, if considered as a reenactment of the earlier law, is to be construed in the light of, and with the meaning of the original Act of March 26, 1790.*

" * * * upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365."

McDonald v. Hovey, 110 U. S. 619.
In the matter of Kang-Gi-Shun-Ca., 109 U. S. 556.
Crenshaw v. United States, 134 U. S. 99.

"The reenacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested."

United States v. Le Bris, 121 U. S. 278.

There must be something clearly showing an intention to change the law.

United States v. Ryder, 110 U. S. 729.

The construction is with reference to the original Act.

"This rule has been repeatedly applied in the construction of the Revised Statutes."

Hamilton v. Rathbone, 175 U. S. 414.

"The meaning of free white persons is to be such as would naturally have been given to it when used in the first naturalization Act of 1790."

Ex parte Shahid, 205 Fed. 812.

(b) *So construed, the words "free white persons" in the Act of March 26, 1790, mean free whites as distinct from blacks, whether slave or free.*

At the time the original law was passed, which provided for the admission of "aliens being free white persons," there can be no question but white was used in counter distinction from black, and "free white persons" included all who were not black. The latter were chiefly slaves, regarded as an inferior race, and the Constitution, Article I, Section 9, provided that

"The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."

which provision was universally understood to be aimed at the abolition of the slave trade after that date It was certainly not used in a scientific or technical sense.

Blumenbach's race classification, which has been cited by many as a basis for construing this Act,

was published in Germany during the American Revolution in 1781. It was first translated into English in London in 1807 by Eliotson.

In re Dow, 213 Fed. 355, 365.

Dow v. United States, 226 Fed. 145.

It was only a few years before this, 1783, that Harvard had permitted those not preparing for the ministry to take French instead of Hebrew, and Charles Follen became the first instructor in German in any college at Harvard in 1825, and it is well known that it was not until much later than 1790 that there was any Germanic influence in American education. In fact, it was an almost unheard of thing that Bancroft, after his graduation in 1817, should go to Germany for further study. No college or university taught anthropology until after the middle of the nineteenth century. The first systematic instruction was at Harvard in 1888 and at Clark University in 1889. The various instrumentalities for anthropological research have grown up since 1875. (Americana Vol. 1, Anthropology.)

None of the Senators or Congressmen had any education which brought them into contact with Blumenbach's classification when this naturalization law was passed in 1790. In the course of a debate on the law in 1790 Madison, who was then in Congress, said:

"They would induce the worthy of mankind to come, the object being to increase the wealth and strength of this country. Those who weaken it are not wanted."

In the same debate, Page of Virginia held that the European policy does not apply here, and that a more liberal system was permissible. It was inconsistent with the claim of Asylum to make hard terms. These would exclude the good and not the bad. He would welcome all kinds of immigrants; all would be good citizens. Lawrence of New York declared that they were seeking to encourage immigration. All comers, rich or poor, would add to the wealth and strength of the country. Those speaking on the other side urged the apprehension from introducing paupers or criminals, or those lacking in character, in knowledge of or attachment to free institutions, for instance, Roger Sherman, who thought the intention of the constitutional provision was to prevent States from forcing undesirable persons on other States, and that Congress would not compel the reception of immigrants likely to be chargeable to a State.

President Jefferson, in his first message to Congress, December, 1801, said, in recommending the repeal of the alien Act of 1798, and the revision of the laws on the subject of naturalization:

"Shall we refuse to the unhappy fugitives from distress that hospitality which the savage of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?"

Judge Lowell, in the most exhaustive discussion that has been had upon the meaning of this section, after showing that race "is not an easy working test

of 'white' color as required by Section 2169," continues:

"Section 2169, however, makes no mention of race or of racial discrimination. 'White persons' are to be naturalized and (except Africans) no others. If we pass from racial speculation and remote history to the usage of the colonies and of the United States in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes and mulattos, Indians, and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes, and Indians; that of 1774 as whites, blacks, and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes, and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children, and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as white and black; that of 1786 as whites, slaves, and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790. 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though sub-

ject to entirely different conditions, continue to compose the population of the republic." Page 80. Here, again, 'white' is made to include all persons not otherwise specified.

"The census act of 1790 (Act March 1, 1790, c. 2, 1 Stat. 101) provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by 'color,' and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat. 428, 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored, and slaves,' and the class 'free colored' was subdivided between blacks and mulattoes. Rev. St., Sect. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 219, Sect. 9, 25 Stat. 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses.' Eleventh Census, part I, p. XCIV. In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, Sect. 7, 30 Stat. 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census.

The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese, and Japanese. In other instances 'colored' as opposed to 'white' was used to include negroes, Chinese, Japanese, and Indians. Throughout the Chapter cited in the above-mentioned Bulletin, it is assumed that all persons not classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes requiring separate accommodation in travel. A statute of Arkansas required separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' Acts 1891, p. 17, c. 17, Sect. 4. See, also, Laws Fla. 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.), p. 987, c. 609, subc. 4 (Code 1904, Sect. 1294d); Civ. Code S. C. 1902, Sect. 2158. Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, Sect. 1231; Ky. St. 1909 (Russell's), Sects. 5607, 5608, 5642, 5765 (Ky. St. 1909, Sects. 4523, 4524, 4428, 4487). The recent Constitution of Oklahoma (Article 23, Sect. 11) reads as follows:

" 'Whenever in this Constitution and laws of this state the words "colored" or "colored person," "negro," or "negro race" are used, the same shall be construed to mean to apply to all persons of African descent. The term "white race" shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japan-

ese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the act of 1790 Congress did not concern itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classified as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

In Re Halladjian, 174 Fed. 834, 841, 842, 843, 844.

(c) *"White person," as construed by the Supreme Court of the United States and by the State courts, means a person without negro blood.*

This was so held by the Supreme Court of the United States in construing Section 2154 of the Revised Statutes, and it was held

"that Congress meant just what the language used conveys to the popular mind."

namely, a person not a negro.

United States v. Perryman, 100 U. S. 235.

We shall give, in connection with citations from the dictionaries, a reference to the numerous States which have used the expression "white person" to distinguish a person who has no negro, or only a part negro, blood in his veins since the abolition of slavery. The earlier statutes in the States are reviewed by Chief Justice Taney in *Dred Scott v. Sandford,* and he shows, by an examination of these, the provision in the Articles of Confederation using the term "free inhabitants," to describe those who were "entitled to all the privileges and immunities of free citizens, in the several States," and the naturalization Act of March 26, 1790, that the expression "free white person" was used to exclude members of the inferior and degraded negro race, whether free or slaves. In discussing the first Militia Law, passed in 1792, he says:

"The language of this law is equally plain and significant with the one just mentioned. It directs that every 'free able-bodied white male citizen' shall be enrolled in the militia. The word 'white' is evidently used to exclude the African race, and the word 'citizen' to exclude unnaturalized foreigners, the latter forming no part of the sovereignty; owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the

country, did owe allegiance to the government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language."

Dred Scott v. Sandford, 19 How. 393, 420.

"White," as used in the legislation of the slave period, meant persons without a mixture of colored blood, whatever the complexion might be.

Du Val v. Johnson, 39 Ark. 182, 192.

(d) *The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro.*

White is defined in the Standard Dictionary as

"1. * * * opposed to black. * * *
"2. Having a light complexion. (1) Of the color of the Eurafrican or Caucasian race: opposed especially to negro, but often to the yellow, brown, or red races of men."

The Century defines white as

"1. * * * The opposite of black or dark.
" * * *
"6. Square; honorable; reliable; as, a white man. (Slang, U. S.)"

Webster defines it as

"1. The opposite of black or dark * * *"

and defines a white person as

"a person of the Caucasian race (6 Fed. 256). In the times of slavery in the United States, *white person* is construed in effect as a person without admixture of colored blood."

"White person" is defined in the new Standard Dictionary as

"1. Any person of the Eurafrican race.

"2. (U. S.) Any person without admixture of negro or Indian blood. Since 1865 various legal constructions of this term have been made in different States, as in Arkansas, where a white person is one having no negro blood, or in Ohio, where one is a white person who has just less than half negro blood in his veins."

"In various statutes and decisions in different States since 1865 *white person* is construed in effect as a person not having any negro blood (Arkansas and Oklahoma). A white person is one having less than one-eighth of negro blood (Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Minnesota, Montana, Tennessee, Texas, Maine, North Carolina and South Carolina). A white person is one having less than one-fourth of negro blood (Michigan, Nebraska, Oregon and Virginia). A white person is one having less than one-half of negro blood (Ohio)."

Webster's New International Dictionary.

(e) *The insertion by Congress of the word "free" in Section 2169 in 1875, a word which had a definite meaning in 1790, but has no meaning if construed as a new enactment in 1875, shows the intention to re-enact the old section with the old meaning.*

In 1875, as we have shown, "free" was inserted in the phrase "free white persons" to distinguish the class of aliens who could be naturalized from all negroes, whether slave or free. Again, at that time slavery existed in this country, and Congress had no power to forbid the slave trade, whether white or black. In 1875 there had been a complete change,

not only in this country, but in the world. Slavery had been abolished in 1865 by the thirteenth amendment, and, as Dr. Francis Wharton used to say, before the Civil War freedom was sectional and slavery universal, whereas, after the war, freedom is universal and slavery sectional. If the word "free" refers to the condition of aliens in the United States, all aliens are free; if it refers to their condition in the country to which they owe allegiance, being domiciled in the United States, the land of the free, they have become free by the mere fact of coming into a free country.

IV.

IF SECTION 2169 IS TO BE CONSTRUED AS A NEW ENACTMENT, AND NOT IN THE LIGHT OF ITS ORIGINAL MEANING, THEN IT IS NOT A LIMITATION, BUT SIMPLY A DECLARATION THAT THE ACT APPLIES TO THE CLASSES NAMED.

No judge and no court has ever analyzed this section, excepting Judge Lowell, and he says:

"To make the additional express inclusion of whites by the amendment of 1875 operate to exclude all other persons from naturalization is an awkward construction, but seems inevitable. By Act May 6, 1882, c. 126, Sect. 14, 22 Stat. 61, the courts were forbidden to naturalize Chinese."

In re Halladjian, 174 Fed. 834.

As a matter of fact, the opinions, from that of Judge Sawyer down, are based on the debates in

Congress and not the language of the provision. As a matter of fact, the debate in 1870 was confined to the Chinese, and at that time the words as used in existing law were restrictive. The remarks of Mr. Poland in 1875 show Congress intended to give the old meaning to the clause.

Even the language of a member of the committee cannot be resorted to for the purpose of construing a statute contrary to its plain terms.

Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184.

And beyond the reports of the committee, the Federal Supreme Court will not go, which court says:

"The unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out."

Lapina v. Williams, ubi supra.

The original language was a part of what became Section 2165, which provided for the naturalization "of an alien, being a free white person." After the enfranchisement of the colored race, by the special Act of July 14, 1870, naturalization was permitted to "aliens of African nativity and * * * persons of African descent." The latter Act is clearly an extension and not a restriction of the right of naturalization. When the Revised Statutes were passed, the words "being a free white person" were left out of Section 2165, and the Act of July 14, 1870, became Section 2169 as follows:

"Sec. 2169. The provisions of this Title shall apply to aliens of African nativity and to persons of African descent."

This is perhaps needless, as Judge Lowell says. At this time any alien could be naturalized, and no court has ever suggested that this phrase was a limitation on Section 2165 and limited naturalization to those of African nativity and descent. The courts continued to naturalize as before. The only change made by the Act to correct errors was to insert in this clause, not then considered a limitation on Section 2165, the words "being free white persons, and to aliens," so that it reads in the present form:

"Sec. 2169. The provisions of this Title shall apply to aliens (being free white persons, and to aliens) of African nativity and to persons of African descent."

By what stretch of reasoning can it be inferred, by the use of this language, that Congress intended to change a section, not restrictive, into a restrictive section?

V.

GIVING THE WORDS "FREE WHITE PERSONS" THEIR COMMON AND POPULAR ACCEPTATION IN 1875, NO DEFINITE RULE CAN BE LAID DOWN, BASED ON COLOR, RACE OR LOCALITY OF ORIGIN, AND THERE IS NOTHING IN THE LAWS OF THE UNITED STATES, ITS TREATIES, IN THE HISTORY OF THE

TIME, OR THE PROCEEDINGS OF CONGRESS, TO SHOW THAT JAPANESE WERE INTENDED TO BE EXCLUDED.

(a) *Up to 1875, there had been no Japanese immigration, no suggestion of their exclusion, and America had recently opened Japan to the western civilization, which Japan was gladly welcoming.*

The immigration reports show that up to 1875 practically no Japanese immigrants had entered America. In the decade 1861-70, two hundred eighteen arrived, and in the next decade the number fell off. Exclusive of students, there were probably not fifty Japanese in the whole country. The Asiatic immigration was Chinese, largely imported to build the Pacific railroads, an immigration of an entirely different character from the present Japanese immigration, an immigration of single men who did not come to establish homes; the women of the race being imported as slaves for immoral purposes. It was a race which came chiefly as contract laborers, expecting to return; and these immigrants are termed indifferently in the debates and in the decisions Mongolian and Chinese. Where the former term is used Chinese is meant.

As Judge Morrow says, using the term with more accuracy:

"That congress has never contemplated or intended to confer the right of naturalization upon Mongolians, *or natives of China,* is palpable by a mere reference to the laws upon the subject of naturaliza-

tion. Section 2169 of the Revised Statutes, under the title 'Naturalization,' reads:

"'The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent.'

"Mongolians, *or persons belonging to the Chinese race,* are not included in this act. This was the view held by Judge Sawyer, sitting on the circuit bench for this circuit (Ninth), *In re Ah Yup,* 5 Sawy. 155, Fed. Cas. No. 104, where the subject was very learnedly and elaborately discussed and considered. He says, in summing up his conclusions:

"'Thus, whatever latitudinarian construction might otherwise have been given to the term "white person," it is entirely clear that congress intended, by this legislation, to exclude Mongolians from the right of naturalization. I am therefore of the opinion that a native of China, of the Mongolian race, is not a white person, within the meaning of the act of Congress.'"

In re Gee Hop, ubi supra.

(b) *Judicial construction of the phrase up to 1875 does not sustain such an exclusion.*

We have already cited the Dred Scott case and a case from Arkansas upon this point. Apart from this, there is little of judicial construction to be found. The Act was before the courts in New York and construed in an ably argued case, in which the Vice-Chancellor, referring to President Madison's declaration in the debates in the Federal Convention in 1787 to the fact that America was indebted to emigration for its settlement and prosperity, showed that the judicial policy was to encourage emigration,

and "to bestow the right of citizenship freely, and with a liberality unknown to the old world."

Lynch v. Clarke, 1 Sandf. 583, 649, 661.

Amongst the Acts discussed are two in which it appears that Virginia amended a statute of May, 1779, Chap. 55, which limited citizenship to *free white persons,* in 1792 to include *"all free persons"* (pp. 666, 667).

A decision by a divided California court, that the words in the 14th section of the Act of April 16, 1850, providing that "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man," included a Chinaman, holding that the term "Indian, from the time of Columbus to the present time, had been used to designate "the whole of the Mongolian race,"

"that 'White' and 'Negro' are generic terms, and refer to two of the great types of mankind."

"and that, even admitting the Indian of this continent is not of the Mongolian type, that the words 'black person,' in the 14th section, must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian."

People v. Hall, 4 Cal. 399, 404.

This decision does not seem to have been treated with much respect as a matter of reasoning; the legislature speedily amended the law, and the same court held that while *People v. Hall* must be followed,

"we cannot presume that all persons having tawny skins and dark complexions are within the principle of that decision."

and allowed a Turk to testify on the ground that the Caucasian type predominated and constituted the controlling element.

People v. Elyea, 14 Cal. 145.

All that Chancellor Kent says is that he "presumes" that the phrase excludes the inhabitants of Africa and their descendants, and then he suggests that it *may* become a question to what *extent* persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify, and

"Perhaps there *might* be difficulties also as to the copper-coloured natives of America, or the yellow or tawny races of the Asiatics, and it may well be *doubted* whether any of them are 'white persons' within the purview of the law."

2 Kent's Comm., p. 72.

(c) *No intelligent rule, applicable to all cases, can be drawn from the decisions since 1875.*

It has been held by the Supreme Court of the United States that a Chinese person cannot become a naturalized citizen under the laws of the United States of May 6, 1882.

Low Wah Suey v. Backus, 225 U. S. 460.

A more accurate statement than the earlier statements by Chief Justice Fuller, commented upon by Judge Lowell,

"That a native of China, of the Mongolian race, is not a white person within the meaning of the act of Congress."

In re Ah Yup, ubi supra.

That "a person of Mongolian nativity" was a native of China and cannot become a citizen (*In re Hong Yen Chang,* 84 Cal. 163) ; that a Burmese, being a Malay, "who under modern ethnological subdivisions are mongolians," is not eligible (sic.) (*In re San C. Po,* 28 N. Y. Supp. 383) ; that it "include members of the white or Caucasian race as distinct from the black, red, yellow and brown races" (*In re Alverto,* ubi supra) ; "The Caucasian race only" (*In re Akhay Kumar Mozumdar,* ubi supra).

"Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them?"
In re Dow, 213 Fed. 355.

"It would not mean Caucasian."
Ex parte Shahid, ubi supra.

It would include persons on the European side of the Mediterranean, although racially descended from many sources, the generally received opinion being that they were white persons.
Dow v. United States, 226 Fed. 145.

It would not include a half white and half Indian, because not of the Caucasian race.
In re Camille, 6 Fed. 256.

Speaking of the section, Judge Lowell, from whom we have already quoted, sums up the whole matter:

"That section implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists.

To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration into disrepute. Here it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend to draw; e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in Section 2169."

In re Mudarri, 176 Fed. 465.

Turning now to the cases dealing with Japanese, Judge Colt held *In re Saito,* 62 Fed. 126, that the Japanese were excluded because Congress refused to extend naturalization to the Mongolian race, and classes Chinese and Japanese on the same footing.

Judge Hanford holds that Japanese are excluded because of

"the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

In re Buntaro Kumagai, 163 Fed. 922.

He does not say what race the Japanese belong to, nor what race is predominant.

In the Bessho case Judge Goff would seem to exclude Japanese because not of the Caucasian race, and Judge Chatfield because

"A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized."
In re Knight, 171 Fed.

The Washington court would seem to exclude them because the naturalization law applied merely to the Caucasian race, and that it had been held *In re Saito* that a native of Japan was of the Mongolian race. (*In re Yamashita,* 30 Wash. 234, 70 Pac. 482) ; and the Utah court held that a Hawaiian, not being of the Caucasian or white race, or of the African race, was excluded. The court seemed to include the Hawaiians as *Mongolians!* (*In re Kanaka Nian,* 6 Utah 259, 21 Pac. 993) ; Judge Maxey admitted a copper-colored Mexican, who aparently was an Indian of unmixed blood, holding that Judge Sawyer's decision might well be limited to members of the Mongolian race, and while the applicant would not be, by any strict scientific classification, classed as white, he fell within the liberal intent of the statute, as shown by the course of the United States Government in annexation and treaty, citing *Lynch v. Clarke,* ubi supra, as to the liberal policy. (*In re Rodriguez,* 81 Fed. 337.) Judge Maxey cites the Acts establishing territorial government for New Mexico and Utah, each of which use the expression

"free white" to describe those entitled to vote, but which in the same section clearly recognize, as included in that definition, Mexicans who are not white or of the Caucasian race (p. 352).

The policy of the United States has been to include into its citizenship by annexation vast numbers of members of races not Caucasian, including many Mongolian. The annexation of Hawaii converted thousands of Japanese, not to mention other nationalities, into American citizens. The most recent is the Porto Rico Act, which makes the Porto Ricans, who are as dark as the Japanese, American citizens.

The petitioner in the court below presented an incomplete list of fourteen naturalizations in various courts, and that court says it is understood that about fifty Japanese have been naturalized in State and Federal courts. (Tr., p. 23.)

VI.

THE WORDS "FREE WHITE PERSONS," NEITHER IN THEIR COMMON AND POPULAR MEANING, NOR IN THEIR SCIENTIFIC DEFINITION, DEFINE A RACE OR RACES OR PRESCRIBE A NATIVITY OR LOCUS OF ORIGIN. THEY DEAL WITH PERSONALITIES AND THE QUALITIES OF PERSONALITIES, AND ARE ONLY SUSCEPTIBLE OF MEANING THOSE PERSONS FIT FOR CITIZENSHIP AND OF THE KIND ADMITTED TO CITIZENSHIP BY THE POLICY OF THE UNITED STATES.

(a) The words deal with personalities, not with races, not with natives of any country or of any particular descent.

(b) The word "free" is an essential part of the clause. Under the old English law, it means a freeholder as distinguished from a serf. Under the Constitution, it is used in opposition to slave. It is a condition which the Declaration of Independence asserts all men are born to. Here, if it has any definite meaning, it imports a freeman a superior, as against an inferior class.

(c) "White" we have already sufficiently defined, and shown that the words "free white persons" had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called "white" as against a class called "black"; the white man against the negro.

VII.

THE JAPANESE ARE "FREE." THEY ARE "WHITE PERSONS," HAVING EUROPEAN AND ARYAN ROOT STOCKS. THEY ARE A SUPERIOR PEOPLE, FIT FOR CITIZENSHIP.

"Of one blood hath He made all nations," says Paul; and from the time of Aristotle, science, as well as religion, has taught a common origin of mankind, and many of the great races today unite in common blood variations from one cause or another and centering in that common blood. Even Blumenbach, who is the father of modern anthropology, says that

"Innumerable varieties of mankind run into one another by insensible degrees."

He invented the division into Caucasian, Mongolian, Ethiopian, American and Malay, of which the Britannica say, referring to the term Caucasian:

"The ill-chosen name of Caucasian invented by Blumenbach * * * and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races."
2 Enc. Brit., p. 113.

On the other hand, Cuvier divides the races into Caucasian, Mongol and Negro, corresponding to white, yellow and black, but this is clearly not sufficient.

Huxley distinguishes four principal types of mankind, the Australoid, Negroid, Mongoloid and Xanthochroic ("fair whites"), adding a fifth variety, the Melanochroic ("dark whites").
2 Enc. Brit., p. 113.

but that work adds, page 114,

"The doctrine of the unity of mankind stands on a firmer base than in previous ages."

and Volume 9, Enc. Brit., p. 851, includes in the Caucasian race certain of the Brown Polynesian races, including Hawaiians and the Ainus.

In "Man Past and Present," Professor A. H. Keane, F. R. G. S., in the "Cambridge Geographical Series," describes mankind under four leading types,

which may be called black, yellow, red, and white, or Ethiopic, Mongolic, American, and Caucasic. He distinguishes Mongolians into three kinds: Northern, Southern and Oceanic, extending from Finland to the Philippines, and reckons the Japanese among the Northern Mongolians, whose color is thus described:

"Light or dirty yellowish amongst all true Mongols and Siberians; very variable (white, sallow, swarthy) in the transitional groups (Finns, Lapps, Maygars, Bulgars, Western Turks, and many Manchus and Koreans); *in Japan the uncovered parts of the body also white*" (p. 266).

The Encyclopaedia Britannica, Vol. 11, p. 635, commenting upon Professor Keane, says:

"The contrast between the yellow and the white types has been softened by the remarkable development of the Japanese following the assimilation of western methods."

The decisive test which modern science has applied is cranial measurements, and it is this test which has excluded the Japanese from the Mongolian division, although Dr. Munro, in a letter written at the very time of the delivery of the paper from which we will quote, referring to the fact that "Every human being is a mixture of root stocks," says:

"It cannot be said that the Japanese are a Mongolian race, but Mendel's rule holds good and one may see pure Mongolian forms sometimes. I have seen a pure Mongolian type in the child of an American Missionary (except the complexion and colour of the eyes) and this type is fairly common in East-central Europe.

"The preservation of a conventional racial type is a matter of aesthetics. What really counts in humanity is home influence and education, and where the ideals are high, the racial type is of little moment. But as the prejudice exists and as each nation has the right to choose its physique, the best plan, as it seems to me, would be for the Japanese authorities to make some selection, from the anthropological point of view, of those going to the States. With regard to the present case, I shall be glad to help if I can and would be glad to make an examination. The head form and facial indices would suffice."

It is a matter of common observation that the women of the Kyoto region in Japan, particularly the higher class, are white and not darker than a large proportion of the women of this country. In fact, the Ainu, who is admitted to be Caucasian, is the darker. The influence of climate and habit has had much to do with the matter of complexion. Ellis, in his Polynesian Researches, speaking of color, says that their infants are born but little darker than European children.

Hawks' Narrative of Commodore Perry's Expedition to Japan, published by order of Congress in 1856, is the first authoritative expression, and perhaps the only governmental expression, on the origin of the Japanese. He says:

"Kaempfer brings them from the plains of Shinar, at the dispersion. He supposes them to have passed from Mesopotamia to the shores of the Caspian, thence through the valleys of the Yenishi, Silinga and paralle rivers to the lake of Argueen; then following the river of that name which arises from the

lake, he thinks they reached the Amoor, following the valley of which they would find themselves in the then uninhabited peninsula of Corea, on the eastern shore of Asia. The passage thence to Japan, especially in the summer season, would not be difficult. He supposes that this migration occupied a long time. * * * This, if not satisfying, is at least ingenious. * * * Dr. Pickering, of the United States exploring expedition, seems disposed, from an observation of some Japanese whom he encountered at the Hawaiian Islands, to assign to them a Malay origin."

and speaking of their alleged Tartar origin, continues:

"But they certainly do not have the Tartar complexion or physiognomy. The common people, according to Thunberg, are of a yellowish color all over, sometimes bordering on brown and sometimes on white."

He also quotes the latter authorities as saying:

"That ladies of distinction, who seldom go out into the open air without being covered, are perfectly white. Siebold also, speaking of the inhabitants of Kiusiu, informs us that, 'the women who protect themselves from the influences of the atmosphere have generally a fine and white skin, and the cheeks of the young girls display a blooming carnation.'"

Doctor N. Gordon Munro, the greatest authority on Japanese ethnology, with Doctor Bally's work as a basis, has had much new material, which has been recently brought to light, on which to base his conclusions, including the work of Gowland, Tsuboi, Baron Kanda, Aston, Torii, Takahashi and Wada, and has recently been giving a series of lectures on

prehistoric and protohistoric Japan before the Asiatic Society of Japan. One of these, on "The Yamato Dolmen Age," delivered at Keio University on March 21, 1917, we will quote at considerable length. It is necessary to premise what Doctor Munro assumes, and which is a fact of comparatively recent scientific development, that the present Japan has two root people, the more northerly Ainu and the more southerly Yamato folk. It is generally conceded that the Ainu are of the white race and allied to the European people. Doctor Munro deals in this paper with the Yamato, saying:

"In respect to the personal investigation I have some justification in the knowledge that the demonstration of Ainu culture in the shellmounds of Honshu and Kyushu and of Yamato remains in shellmounds and stone age sites of the South is pioneer work, far from complete, but establishing the Ainu as aborigines and the Yamato root-folk as having also a birthright, if not as the prior autochthones of Japan * * *"

He then goes on to say:

" * * * at the risk of again overcrowding material I shall first show some representative pictures of material preserved in and by association with the sepulchres of the Yamato and shall folow this with illustrations of these sepulchres themselves. I shall then present some evidence of similar sepulchres and of magalithic monuments in Europe with a rough sketch map showing their prevalence in the Mediterranean area and through the Eurasiatic continent. * * *"

finding the immediate source of this culture in

"Korea, the proximate habitat of the Yamato invasion and immigration. From thence in all probability, came the virile forces of the iron wielding 'horseback domination' which ultimately united with the agricultural pre-Yamato folk of Kyushu and possibly around the Inland Sea."

y here he thinks these people may have lived for a considerable time before invading Japan.

After referring to prototypes in Europe, in Egypt, in Greece and around the Mediterranean generally, he says:

"We must, however, leave such parallels in culture and I can steal only one minute from our remaining time to point out the course of the ancient Japanese concept the *Mitsudomoe,* which is here shown and which from these examples may be traced into China and thence into Babylonian culture and that of the Mediterranean prehistoric civilization, where it is found on the spindle weights of Troy. It was also familiar as the anthropomorphic concept in the sun in almost every land (Egypt perhaps excepted) conventialised from the biped concept as a sign of mankind."

and after describing the sepulchres themselves, and discussing whether there was any contact with China, he concludes:

"But it is not necessary to suppose that this 'Horse-back domination' ever came into close contact with the Chinese before settling in Korea.

"Where then did the dolmen originate? That is likewise uncertain. But we know where dolmens existed at a date long anterior to those in Japan. That was in North Africa and in Europe, where dolmens contain relics of the later stone age and the early metal phases of copper and bronze, but rarely

the least trace of iron. In Japan, on the other hand, the dolmens are of the iron age, with vestiges of the bronze period and mere traces of a stone age in conventional offerings."

and says there is something maritime in the location of the people of allied culture, and tracing this course he continues:

"This culture did not spread into Egypt, though there are two patches on the Nile, but it is found in Syria and Palestine round the Black Sea and between it and the Caspian, in the Caucuses and southern Russia whence it spread into Siberia in a mitigated form. It also entered Arabia, Madagascar and Persia, while in southern and central southern India it was established on an immense scale. Whether it reached India by sea or land is not yet certain, but traces at least are known in northern India and it has been followed into Burmah."

after which he still further concludes that it is maritime, referring incidentally to the remains on the Island of Ponape, described by Christian in his book on the Carolines, and says:

" * * * if we note the similarity of special designs and contrivances between East and West in prehistoric times, we have, I think, good ground for the belief that the dolmen culture of Japan was rooted in the Mediterranean area. It is a far cry from Japan to this area or to the region of the five seas, and it may be premature yet to insist on any limited area for the provenance of the Caucasian element in the Japanese people.

"Whether there was any connection between the Yamato root-folk in Kyushu and the infiltration of European stock into the Pacific which resulted in the

so-called Polynesian race, is another problem which is not yet ripe for solution. Any such connection must have been at a very remote age. * * *"

and in conclusion says:

"My opinion is that the Yamato root-folk of Kyushu and the present Polynesian people diverged from an Indonesian or other stock of European affinities in the very early stage of the neolithic or polished stone age, possibly in later palaeolithic times.

"The Korean contribution to the Yamato probably came not only from the southern coast of Asia and the islands near to it, but also through Manchuria, possibly migrating in part from the Caspian sea, and keeping north of the fortieth parallel. Otherwise it seems to me that this migration through Asia must have occurred before the Chinese civilisation had concentrated south of that latitude. I do not doubt that some Mongolian element had penetrated the islands to the south of Japan in ancient times; indeed, I have evidence of it. But I think this element was inconsiderable and that we must look to the soldiery and the agricultural serfs in the Korean immigration for the Mongolian component persisting in Japan. That this ingredient is present admits of no question, but that is a very different thing from the assertion that the Japanese are a Mongolian race. I affirm that the Japanese are not predominantly Mongolian. Physical anthropology teaches us that the Japanese, as we ourselves, are a mixture, a conglomeration of characters of primitive as well as of advanced mankind. If I have been at all successful in demonstrating this in my first lecture; if we have come to the conclusion that the Ainu are, if themselves mixed with other characters, an early European stock, that they have mingled to some extent with the Yamato stock, considerably in the South and noticeably in the North; if the considerations which I have just brought forward with regard to the European provenance of Yamato culture have any validity in con-

junction with the decided evidence of European traits in the physique of the modern Japanese, we cannot resist the conclusion that the word Mongolian is not a fit designation for the people of this land."

Little need be added to the tributes in the Senate of the United States, which we have quoted from the debate on the immigration Act of this year, but a summary of the history of the Japanese people during the last five or six hundred years by George Kennan, the distinguished traveler, which we take from The Outlook of June 27, 1914, is in point:

"At the beginning of the seventeenth century the Japanese were the most daring and adventurous navigators in all the Far East. Their insular position made them hardy and expert sailors, and they had at sea a natural intrepidity which was almost equal to that of the Northmen. At the very dawn of authentic history their ships were cruising along the coasts of China and Korea, and as early as the sixth century an armed Japanese flotilla sailed northward to what is now Siberia and ascended the Amur River for the purpose of invading Manchuria. * * *"

"Toward the close of the fifteenth century Japanese merchants began to extend their foreign trade to countries not previously visited, and as early as 1541 they had established commercial relations with more than twenty oversea markets, and were sending their ships to regions as remote as Java, the Malay Peninsula, Siam, and the western coast of India. In 1594, twenty-six years before our Pilgrim Fathers landed on the coast of Massachusetts, the Japanese had a regular line of merchant ships running to Luzon, Amoy, Macao, Annam, Tonquin, Cambodia, Malacca, and India, and making, without any great difficulty or danger, out-and-return voyages of from three thousand to twelve thousand miles. * * * They were quite capable of crossing the Pacific, and, as a matter

of fact, two of them did go to Acapulco and back in 1610 and 1613. The sailors who manned these vessels were not as experienced as were the Spanish and Portuguese navigators of the same period, but what they lacked in experienc they made up in enterprise, daring and resourcefulness. * * *

"All the Japanese of that time were imbued with an ardent spirit of daring and adventure, and long before the Mayflower sailed from Plymouth they had settlements, or colonies, in countries that are farther away from Japan than Massachusetts is from England. They took possession of the Luchu Islands, overran Formosa, helped the Spanish Governor of the Philippines to put down a revolt of the Chinese in Luzon, gained a strong foothold in Siam, and, fighting there in defense of the King, defeated invading forces of both Spaniards and Portuguese. Everywhere they were regarded as dangerous enemies, and in the library of Manila there is still in existence a copy of a letter written by a Spanish friar to his home government in 1592, warning the authorities of Spain that the Japanese were 'a very formidable people,' and that their great Shogun, Toyotomi Hideyoshi, was likely to invade the Philippines as soon as he had finished the conquest of Korea. * * *

"There is a widespread popular belief that in the Middle Ages, and, indeed, long after the Middle Ages, the Japanese were an uncivilized if not a barbarous people; but this belief is based wholly on ignorance or misapprehension of their history and institutions. * * * As early as the seventh century the Japanese had schools, and before the beginning of the eighth they had established in Nara and Kyoto Imperial universities with affiliated colleges and courses of instruction in ethics, law, history, and mathematics. The oldest university in Europe, that of Salerno, in Italy, was not founded until one hundred years later. The Japanese opened a great public library at Kanazawa in 1270, and established their first astronomical observatory more than a century before Commodore Perry entered Uraga Bay.

"Even in the field of material achievement, the mediaeval Japanese were pre-eminent. They would have regarded our invasion of Cuba with a force of 16,000 men as a very trivial affair. In 1592 their great leader, Hideyoshi, transported 200,000 men across the Tsushima Strait to Korea, and his first army corps, under General Konishi, marched 267 miles in nineteen days, fighting one pitched battle, storming two fortresses, and carrying two strongly-intrenched positions by assault. General Shafter was never more than eighteen miles from his sea base, while General Konishi, with Hideyoshi's first army corps, went 400 miles from his base at Fusan, and maintained intact through a hostile territory a line of communications. * * *"

VIII.

THE JAPANESE ARE ASSIMILABLE.

The debates in Congress and the literary controversies embodied in many books and articles on the Japanese question reduce the objection to Japanese naturalization to the claim that they are "non-assimilable." (Senator Phelan, p. 284; Senator Works, p. 228.) This means that it is impossible for them and undesirable for us to have them adapt themselves to western ideas. This is a reversal of our traditional national policy, for it was President Fillmore who sent Commodore Perry to overturn the Japanese policy, which sought to prevent assimilation, and open up Japan to western civilization. The first article of the Perry treaty of 1854 declares:

"There shall be a perfect, permanent, and universal peace and a sincere and cordial amity between the United States of America on the one part, and

the Empire of Japan on the other, and between their people respectively, without exception of *persons* and *places*."

Having given Japan the bread of western civilization, shall the Japanese be forbidden to eat it? In view of the last sixty years, the charge is ridiculous. In what respect are they non-assimilable? Do they not have high ideals of honor, of duty, of patriotism, of family life, of religion and of social duty, and do they not adhere to these better than we do? The dignity of manhood is held up by the Declaration of Independence as the highest ideal of Americanism. How about our treatment of the black man in the south, or the Oriental in the west? In art and literature, the criticism of the Japanese today is of the abandonment of their ideas, and too easy adaptation of western methods. In religion, Buddhism and Shintoism have been infused from some source so strongly with Christian ideals that their followers do not see the contrasting splendor of the Christian faith as strongly as awakened Korea does. Of course, they have a race prejudice, but nothing compared with that of the Jew, whom we gladly welcome and protect even in foreign lands, who sits in the halls of Congress, in our highest courts, amongst our executives, in the marts of trade. Naturally, a Japanese prefers to marry a Japanese, not only on account of race prejudice, but for other obvious reasons; but they do intermarry with whites, and the almost uniform testimony is that they have happy families and vigorous progeny, preeminently Ameri-

can. Section 2169 authorizes the naturalization of black men, but half the States forbid marriage between whites and blacks.

We would hardly require the Japanese to assimilate our manners, for their manners, particularly those of the women, are far superior to our own. If, as seems true, the only argument against the fitness of the Japanese for naturalization is their non-assimilability, the argument is ended, for it is preposterous to claim that a nation which has shown itself to have the greatest capacity for adaptation, against whom the severest criticism is that they are imitators, is not capable of adapting itself to our civilization.

It cannot be said that the Japanese do not come to make a home, or that they have not that earth hunger which led our ancestors to cross the sea. The earth hunger of the Japanese and the wish to make a home is the objection of California. It cannot be said that he lowers the standard of living. The "drastic investigation" authorized by the California legislature of 1909 found that the Japanese employed by white farmers were paid as much as white laborers, and that the Japanese paid more than the white man.

Race prejudice will always exist. It is innocuous in Hawaii, where the variety of race prejudices renders any dominant race prejudice impossible.

Finally, the change in the last fifty years in the

habits, attitude towards the world, and the Constitution of Japan is a sufficient answer.

The story of the Japanese in Hawaii is significant. They are estimated to comprise 97,000 out of a population of 228,771, exclusive of the army and navy (Report of the Governor of Hawaii to the Secretary of the Interior, 1916, p. 4), or 42.5 per cent.

In business, the report shows that out of 1780 independent houses of business in Honolulu the Japanese have 754; while in Hilo, out of 398, they have 248, or 1002 out of 2178, 46 per cent—slightly higher than the proportion of population.

The Japanese have the lowest percentage of convictions of crime in proportion to population, namely, 2.39 per cent, excepting the whites (including the Portuguese), who have 2.26 per cent. Excluding the Portuguese, the whites would have a higher percentage (p. 74); and the Japanese convictions are chiefly, like the Chinese, for gambling. Thus, the Japanese, although having 42.5 per cent of the population, have but 13.31 per cent of the prisoners, less than a third in proportion (p. 77). Of the delinquent and dependent boys and girls brought before the Juvenile Court, there were only 54 Japanese, or 9 per cent, whereas the proportion of population is 42.5 per cent. If convictions for gambling are eliminated (see report of the Chief Justice to the legislature), there are 1794 convictions of whites (including Portuguese), with an estimated population of 35,322, to 1686 convictions of Japanese. In other words,

(gambling aside) there are three white convictions to one Japanese, in ratio to population.

Much has been said about the picture brides and divorces, but from the records of the Circuit Courts of Hawaii, in the same report of the Chief Justice, it appears that in 1916, 379 divorces were granted in the Territory, 193 of which were Japanese, but 8 per cent larger than the percentage to population. This result should be surprising to one who is not familiar with the care which is bestowed on marriage by that method.

Mr. M. M. Scott, for thirty-five years head of the High School in Honolulu and known to every student of the Japanese, says of their racial origin and assimability, in a memorandum summing up what he has published at various times:

"The Japanese people are classed as Mongolians by those who know absolutely nothing about physical anthropology. Those physical anthropologists that have studied bodily characters of the Japanese, all agree that they do not belong to the Mongolian race, whose main habitation is in Central Asia. Kaempfer, Titsignh, Von Rein, Morse and Bachelor, who were all skilled anthropologists, feel sure that whatever mixture there may be in their racial stock, Mongolian blood is not the predominant, nor even a large element in the Japanese. Not one of them would be rash enough to say what element of blood is the predominant one. The Japanese are a very mixed race, as any one may observe who travels from the extreme north to the extreme south of their elongated Empire.

"I have been acquainted with the Japanese people for forty-five years. I was, by invitation of the Japanese government, for ten years from 1871 in their

service in establishing a system of elementary schools throughout the country. In no one physical character do the Japanese people correspond to a like physical character of the true Mongolian. Neither in color of skin, nor pigment, nor stature, nor in measurement of limbs, above all, in 'cephalic index,' the surest character to determine race, can the Japanese be called Mongolians.

"First as to color of skin. In certain parts of Japan, regarded by their own ethnologists, the skin and pigment therein are more nearly white than yellow or brown. In the town of Sendai, in the north of the main island, the skin of the children and the women not in the fields would be taken by strangers, as belonging to the white race, rather than to any of the classified colored races. Likewise, in the typical Japanese city of Kyoto, those not exposed to the heat of the summer sun are particularly white-skinned. They are whiter than the average Italian, Spaniard or Portuguese.

"As before mentioned, the one character regarded by all anthropologists as the main one, is the 'cephalic index.' Now, the 'cephalic index' of the average Japanese corresponds more nearly with the Central European skull than it does with Chinese or Mongolian. The 'cephalic index' is from eighty to eighty-two, about the same as the great Germanic race. The modern anthropologist, Ratzal, regarded the world over as one of the most distinguished on this subject, agrees with the earlier writers mentioned in the foregoing part of this sketch. As to the possibility of assimilation to American standards of governments and all other things American, I regard the Japanese as one of the most assimilable of all the races of man, or what is known in the United States as the 'New Immigration.' Truth to tell, since the Japanese have become a settled people, ethnically homogeneous, they have been assimilating everything they were shown from other nations. For a thousand years, with no intercommunication, except slight ingress and egress with China and Korea,

they borrowed from China and Korea letters, literature and the art of porcelain making. They have improved by their peculiar genius on everything they borrowed from these two places.

"Since the opening of Japan by Commodore Perry in 1854, treaties and communications with Western Nations have enabled the Japanese to assimilate science, industries, commerce, and politics with a rapidity that no other nation has ever shown. Their students are great admirers of American governmental forms, and even social forms. There is an immense body of men today in Japan urging a democratic and constitutional government on the model of that of the United States. There is no question but in a brief time their forms of government will be as liberal and democratic as those of England and the United States. They are immensely loyal—loyal to family and loyal to properly constituted government. Those Japanese born and nurtured in Hawaii are as much American as the children of the descendants of the Pilgrim Fathers that came to this country to Christianize the Hawaiians. Let me repeat, and I measure my words in so doing, with nearly a half century of study and association with the Japanese, that I am persuaded that they will make as loyal and patriotic American citizens as any that we have."

CONCLUSION.

In conclusion, we ask this court to give to the great question submitted the informed and discriminating consideration which it deserves but has not yet received, and we confidently hope that such consideration will lead the court to hold that the United States, after extending a hand to welcome to its civilization a great and then well-contented people, did not coldly withdraw that hand, on the ground that

they were among the undesirable and outcast of earth.

DATED, Honolulu, T. H., May 1, 1917.

Respectfully submitted,

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No. 2888

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TAKAO OZAWA,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the United States District Court of the Territory of Hawaii.

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BRIEF FOR APPELLEE.

FACTS.

This case was brought here from the District Court of Hawaii on appeal from a decree denying the petition for citizenship of appellant, Takao Ozawa.

The record discloses that appellant is of the Japanese race and born in Japan. There was only one question raised and decided in the Court below—Was the appellant eligible to citizenship under our naturalization laws, he being of the Japanese race and born in Japan?

The Court, in a very able and exhaustive opinion upon the interpretation of our naturalization laws held that he was not; that a native of Japan was not

qualified for citizenship under the Revised Statutes, Section 2169.

The record discloses that there were other material grounds in which the Court could have denied the said appellant's petition and the Government now urges that these grounds be considered by this Court for, if the theory upon which the lower Court based its decree is wrong, the Appellate Court will affirm the decree of the trial court if it finds in the record any reason which it considers sound, even though the district judge may have rejected that reason and rested his decree on some other ground.

Smiley vs. *Barker,* 83 Fed. 687
Baker vs. *Kaiser,* 126 Fed. 319
Dean vs. *Davis,* 212 Fed. 88.

The record shows that appellant filed Declaration of Intention on the first day of August, 1902 (Trans. p. 4) and filed his petition to be admitted a citizen of the United States October 16, 1914 (Trans. p. 9). It will be noted that over twelve years had expired between the filing of his first and last papers and over seven years from the time the Act of June 29, 1906 (34th Stat. Part. 1, p. 596) went into effect, to the filing of his petition for citizenship, or his last papers, as they are frequently called.

Sub-section 2 of Section 4 of the Act of June 1906 reads in part:

> "Not less than two years nor more than seven years after he has made such Declaration of Intention, he shall make and file, in duplicate,

> a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence, etc."

The Courts have frequently held that this section of the statute is mandatory and if citizenship is granted, when not in compliance with this section, that it is illegally procured and should be set aside. It has been argued that the law of June 29, 1906, is not applicable to those Declarations of Intentions that were made prior to the passage of the Act, but this is not the construction of the law in the decisions of the higher Courts.

The case of *Yunghauss* vs. *U. S.,* 218 Fed. p. 169, Circuit Court of Appeals for the 2nd Circuit, said:

> "A declaration made prior to the Act of 1906 is valid, no matter how long prior thereto it may have been made, but after date of the passage of that Act the person who made the declaration has no superior rights to one who declares thereafter. In both cases action must be taken within the seven years. It seems to us that this is what Congress intended. In effect the Act says to the alien who has made his declaration prior to 1906:
>
> > 'Your declaration is in all respects valid, but if you wish to become a citizen you cannot delay your application for a period of over seven years from the passage of the Act.'
>
> The cases sustaining this view are
> *In re Wehrli* (D. C.) 157 Fed. 938,

In re Goldstein (D. C.) 211 Fed. 163,

In re Harmen vs. *U. S.* 223 Fed. 425.

> The opposing view is clearly stated by Judge Orr in *Eichhorst* vs. *Lindsey* (D. C.) 209 Fed. 708, and by Judge Maxey in *Re Anderson* (D. C.) 214 Fed. 662."

The case Eichorst vs. Lindsey, referred to above as opposing the views here taken by the Government, and against the views of the Circuit Court of Appeals of the First and Second Circuits, was decided by Judge Orr of the United States District Court. The same question came before him in the case of *U. S.* vs. *Lengyel,* 220 Fed. 724, in which the Court said:

> "This court has already expressed its views against such a construction of the act in the case of *Eichhorst* vs. *Lindsey,* 209 Fed. 708, resting more particularly upon the fundamental principle that an act of a legislative body should not be construed as retroactive, unless the language employed expresses a contrary intention in unequivocal terms."

It would seem that the holding of the Supreme Court in the case of *Johannessen vs. U. S.* 225 U. S. 243, relative to the same subject pertaining to Section 15 of the same act, would warrant the same construction upon paragraphs 1 and 2 of Section 4 of the Act.

In a very recent case, *United States of America* vs. *Solomon Louis Ginsberg,* the Supreme Court said, speaking by Mr. Justice McReynolds:

"No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in section fifteen and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential."

Returning now to the issue made and determined in the lower Court, as to whether the applicant is a white person within the purview of Section 2169 R. S., which reads as follows:

"The provisions of this Title (Naturalization) shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent.

The limiting words 'free white persons' were used in the first naturalization law passed in this country, approved March 6, 1790 (U. S. Stat. L., Vol. 1, pp. 103 and 104), and with the exception of the period from 1873 to 1875, have been continued in the various statutes passed respecting naturalization. (The excepted period will be referred to later on in this brief.)

To ascertain the true construction of the term 'white persons' it is first necessary to refer to the reason for their adoption, the period and conditions prompting them, the reason for their subsequent retention, and thereafter to dispose of the question of whether ethnology, anthropol-

ogy, and the words 'Caucasian' and 'Aryan' are pertinent to the issue.

Every statute must be construed with reference to the object intended to be accomplished by it. 35 Cyc. 1106.

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. 36 Cyc. 1106.

A statute must be construed with reference to the time of the passage thereof, or with reference to its going into effect. That meaning must be given to words which they had at the date of the act, and descriptive matter therein must refer to things as they existed at the time of its passage. 26 Amer. & Eng. Enc. Law, 611.

A thing within the intention of the legislature in framing a statute is often as much within the statute as if it were within the letter. *Rigney* vs. *Plaster* (C. C.) 88 Fed., 689.

The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *U. S.* vs. *Union P. R. Co.,* 91 U. S., 79;

In accordance with the maxim *'Expressio unius est exclusio alterius',* when a statute enumerates the things upon which it is to operate or forbids certain things it is to be construed as excluding from its effect all those things not expressly mentioned. 36 Cyc. 1122.

In the interpretation of statutes words in common use are to be construed in their natural, plain, and ordinary signification, unless it can be shown that they are used in a technical sense. 36 Cyc. 1114; *In re Saito, supra.*

The term 'white person' must be given its common or popular meaning'. In *re Young* (D C. O.) 198 Fed., 716.

History records that the founders of these United States were from the north of Europe, and were white people in every sense that the words imply. Their customs and usuages are too well known to need elaboration, and suffice it to say that slavery was permitted in some of the colonies, many of these slaves being white men from Europe. The indenture of this class was due to various causes, but it was recognized by the colonists that the disqualifications of these white men might in time be removed. After regaining their freedom these men were permitted a voice in the Government, and in all respects were on a par with the other white freemen. All of the foregoing references to history leads up to the statement that the Congress in 1790 recognized in this class the same type that they themselves were, and in the use of the term 'free white persons' it was this class it was designed to cover. The same did not appeal to them, however, so far as the mixed races and blacks were concerned, and the law was framed solely to retain the control of Government in the white people who had founded the country, or in people, who, like themselves, were from Europe.

At the time the legislation was originally framed it was generally taught that there were four races, the white, yellow, red, and black, and regardless of so-called discoveries and wholly artificial terms used by ethnologists, and incidentally in dispute among them, within comparatively recent times the general teaching has been the same.

After the Thirteenth and Fourteenth Amendments to the Federal Constitution were adopted, the former prohibiting slavery and the latter declaring who shall be citizens, Congress, in the act of July 14, 1870, amended the naturalization laws by adding the following provision: 'That the naturalization laws are hereby extended to aliens of African nativity, and to persons of African descent.' (16 Stats. 256, Sec. 7).

Upon the revision of the statutes in 1873, the words 'free white persons' were omitted, probably through inadvertence. Under the act of February 18, 1875, to correct errors and supply omissions this section of the statute was amended by inserting or restoring these words.

> 'In moving to adopt this amendment in the House it was stated that this omission operated to extend naturalization to all classes of aliens, and especially to Asiatics * * * * The debate which followed proceeded on the assumption that by restoring the word 'white' the Asiatic would be excluded from naturalization, and the motion was adopted with this understanding of its effect.' 3 Cong. Rec. pt. 2 p. 1081. In re Saito, 62 Fed., 187.

Note particularly the words '*African nativity*' and '*African descent.*' They no more aptly describe the negro than 'white' does to the European, and yet we know that negroes alone were intended. That leaves outside the pale of eligibles to American citizenship under its naturalization laws the Asiatics, not by direct legislation as in the case of Indians, but by necessary inference from the fact that whites and blacks are alone given the benefit of our naturalization laws. In other words, the term 'white' as used by 'the fathers' was a convenient general designation that would sufficiently describe Europeans. Europeans were most nearly allied of all races to those who established this free government, for which reason there was less danger to the interests established by incorporating into the body politics of Europeans than would result from the introduction of people who were more remote, not simply in their origin or in the tinting of their complexion, but in their ideals and standards, from those for which the colonists had made such sacrifices, and had incurred such risks.

If ethnology were the true test under section 2169 R. S., of an applicant's admissibility to citizenship it is but proper to state that the Court would be confronted with the question of what school of ethnology or what so-called expert's views it should take. The disputes and changes among the ethnologists themselves are too well known to comment upon and their classifications in many instances, if accepted as the test would bar from American citizenship peoples from Europe who to-day are accepted as 'white persons'

and admitted by the courts. The so-called Finns are generally classed by ethnologists as a part of the Yellow race. Whatever the origin of these peoples, their admission to citizenship, and it is no inconsiderable amount, has never been opposed for the reason that their customs, ideals and standards, and characteristics, so closely conform to those of the founders of this country, whether the cause be their blending with new peoples or whatever it may be, that they are considered as desirable acquisitions and embraced within the term 'white persons'.

If anthropology were to have a bearing on the question the courts would always be confronted with the necessity for differentiating between those inhabitants of India who call themselves Hindus, Parsees, Brahmans, Sikhs, and other natives of India or so-called Hindus with whom they have been living and marrying during the past twelve hundred years, or to call upon an anthropological expert to assist. The tides of immigration which have swept back and forth across the continents of Europe and Asia have to a large extent altered racial characteristics, due to intermarriage, climatic conditions and other causes, and have in many instances almost totally obliterated the original contours and strains.

Judge Thompson rendered an opinion on September 24, 1912 (198 Fed., 688) in the case of *In re Alverto,* holding that the petitioner, a native of the Philippines, whose paternal grandfather was a Spaniard and who married a native woman, the petitioner's father, who was born in

the Philippines also having married a native Filipino woman, could not be admitted to citizenship because not within the provisions of Section 2169 R. S., and dismissed the application.

The simpler and better course, supported by decisions and in the interests of the welfare of this country, would be served if the question of color and racial characteristics were disregarded and the demarcation went simply to the question of whether the alien is of that class contemplated by Congress, to wit, the Europeans who were furnishing the sinews which have resulted in the progress and advancement of this nation.

The question of color is regarded as inconsequential, because if the term 'white person' were to be construed with regard to this alone, a person of lily white color, regardless of any other fact would have a decided advantage over a decided brunette however much the latter might be within the terms of the act. If the question of whether the birthplace of the forefathers of this applicant for centuries back is to control, it might well be asked whether the term 'white person' could be limited to any person seeking American citizenship. It is not an individual that the Court has to deal with in this instance, but with a class, 'Japanese', which from time almost immemorial has lived under totally different ideals, standards, customs, and usuages from those of the framers of this legislation and those of us to whom the term is generally accepted as applicable. It is inconceivable that Congress should have intended to open the doors of citizenship to Asiatics, who for the reasons

referred to above, could never, should they come to this country, be assimilated into the body politic, and with regard to whom ethnologists are wholly at variance.

The words 'Caucasian' and 'Aryan' are treated of in *Ex parte Shahid,* 205 Fed., 812, so thoroughly that they are set forth below as sufficient for the purpose of covering this phase of the question at issue. In this case the following authorities were examined by the Court:

In re Ah Yup, 5 Sawy. 155 (Fed. Cas. 104)

In re Camille (C. C.), 6 Sawy. 541 (6 Fed., 256)

In re Gee Hop (D. C.), 71 Fed. 274

In re Rodriguez (D. C.), 81 Fed. 337

In re Kumagai (D. C.), 163 Fed. 922

In re Knight (D. C.), 171 Fed. 299

In re Najour (C. C.), 174 Fed. 735

In re Halladjian (C. C.), 174 Fed. 834

In re Mudarri (C. C.), 176 Fed. 465

Bessho vs. *U. S.* (C. C. A.), 178 Fed. 245 (101 C. C. A.)

In re Ellis (D. C.), 179 Fed. 1002

In re Balsara (C. C.), 171 Fed. 294 (CCA. 180 Fed. 694).

The Court then states (at page 814), "After considering them all in an attempt to evolve, if possible, some definite rule for judicial decision, the conclusion that this Court has arrived

at is as follows: That the meaning of free white persons is to be such as would naturally have been given it when used in the first naturalization act of 1790. Under such interpretation it would mean by the term 'free white persons' all persons belonging to the European races, then commonly counted as white, and their descendants. It would not mean a 'Caucasian' race, a term generally employed only after the date of the statute and in a most loose and indefinite way.

The term 'Caucasian' obtained much currency in the pro and anti slavery discussions between 1830 and 1860, but later and more discriminating examination and analysis has shown its entire inapplicability as denoting the families or stocks inhabiting Europe and speaking either so-called Aryan or Semitic languages. Nor would 'free white persons' mean an 'Aryan' race, a word of much later coinage, and practically unknown to common usuage in 1790, and one still more indefinite than Caucasian, and which would exclude all Semitics, viz., Jews and Arabians, and also all Europeans, such as Magyars, Finns and Basques, not included in the Aryan family. It would not mean 'Indo-European' races, as sometimes ethnologically at the present day defined as including the present mixed Indo-European, Hindu, Malay, and Dravidian, inhabitants of East India and Ceylon; nor the mixed Indo-European, Dravidian, Semitic, and Mongolian peoples who inhabit Persia. It would mean only such persons as were in 1790 known as White Europeans, with their descendants, including as their descendants their de-

scendants in other countries to which they have emigrated, such as the descendants of the English in Africa or Australia, or the French and Germans and Russians in other countries. At page 815 the Court continues: 'In 1790 the distinctions of race were not so well known or carefully drawn as they are today. At that date all Europeans were commonly classed as the white race, and the term 'white' person in the statute then enacted must be construed accordingly. To hold that a pure-blooded Chinaman, because born in England or France, was included within the term, would be as far fetched as to hold that a pure-blooded Englishman, Irishman, or German born in China was excluded.'

The modern Bengalee or Parsee or Persian may be partly of Indo-European descent. The ancient Zend and Vedic writings apparently emanate from a fair-complexioned, light-haired, if not blue-eyed people. The speakers of Sandcrit, who conquered Hindoostan, or the speakers of the ancient Zend, who conquered Persia, were probably in that category. But in India the conqueror seems to have been soon swallowed up in an enormously preponderant brown or black people of different race, and in Persia the same result followed in a degree afterwards accentuated by the terrible Mongolian or Tartar invasions which destroyed whole communities, replacing them by pure Mongolians. In most Asiatic countries the governing or controlling element or strain is apparently that of a dark-colored people, not of European descent. * * *

In the face of all these difficulties it is safest to follow the reasonable construction of the stat-

ute as it would appear to have been intended at the time of its passage, and understand it as restricting the words 'free white persons' to mean persons as then understood to be of European habitancy or descent.

Continuing on page 816, the Court says: 'The geographical interpretation that 'free white persons' means person of European habitancy and descent is at least capable of uniform application, and gives to the statute a construction that avoids the uncertainties of shades of color and invidious discriminations as to the race of individuals.''

Chancellor Kent as early as 1827 (2 Kent Comm. 72) stated that it might well be doubted whether the copper colored natives of America or the yellow or tawny races of the Asiatics are white persons within the purview of the law.

This view seems to be fully in accord with the following cases, some of the applicants being of the same race as the appellant:

In re Saito, 62 Fed. 126,

In re Dow, 213 Fed. 355,

In re Camille, 6 Fed. 256,

In re Takuji Yamaslutu, 70 Pac. 482,

In re Young, 195 Fed. 645,

In re Young, 198 Fed. 715.

It is argued by the appellant's counsel that the Act of June 29, 1906, is complete in itself and is not limited or restricted by Section 2169 of Title XXX R. S.

The Act of June 29, 1906, is not complete except in so far as is expressed by its terms. It provides for "a uniform *rule* for the naturalization of aliens throughout the United States" and sets forth the "manner" in which an alien may become a citizen of the United States, but it does not include or purport to include all the laws of the United States relating to the naturalization of aliens and in that sense is not a complete Act of Naturalization. It did not supercede and was not intended to supercede any of the laws relating to the naturalization of aliens except those set forth in Section 26 of said Act, including all acts or parts of acts inconsistent with or repugnant to said Act or any portion thereof.

This seems to be the construction of the Court in the case in *re Alverto,* 198 Fed. p. 690, in which the Court said:

> "The Naturalization Act of 1906 expressly repealed many of the then existing provisions of law in relation to naturalization. Section 2169 was not repealed, and, if Congress had not intended its provisions to apply to section 30 of the Act of 1906, such intention would naturally appear in the Act. As it has not excepted section 30 of the Act from the provisions of Section 2169, Revised Statutes, the latter section must be held to be an applicable provision of the Naturalization Laws."

Section 2169 sets forth the races who may be naturalized and the Act of June 29, 1906, sets forth the manner, conditions and procedure under which the

races who may be naturalized may secure admission to citizenship. Had it been intended to make the Act of June 29, 1906, a complete Act of Naturalization, it is fair to assume that the whole of Title XXX of the Revised Statutes would have been repealed, and such sections thereof as it was desired to retain would have been reenacted as a part of said Act. As Congress repealed only certain sections of Title XXX it must be presumed that it was intended to leave the sections of Title XXX which were not repealed as a part of the Natrualization Law in as full force and effect as before the enactment of the Act of June 29, 1906.

The Act of March 26, 1790, U. S. Stats. at L., Vol. 1, pp. 103, 104, the first act providing for the naturalization of aliens, provided for the admission to citizenship only of "any alien being a free white person".

In the Act of June 29, 1895, Vol. 1, pp. 414, 415 U. S. Stats. at L., the second Naturalization Act, it was again provided "that any alien being a free white person may be admitted to become a citizen of the United States or any of them on the following conditions and not otherwise * * *". This language was substantially repeated in the Act of April 14, 1802, Vol. 2, pp. 153-155, U. S. Stats. at L., in the Act of May 26, 1824, U. S. Stats. at L., Vol. 4, p. 69 and in the Act of May 24, 1828, U. S. Stats. at L., Vol. 4, pp. 310, 311.

In no Act of Congress was any provision made for the naturalization of any other person than "an alien being a free white person" until Congress provided in Section 7 of the Act of July 14, 1870, U. S. Stats. at L., Vol. 16, p. 256 "That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent".

In the first edition of the Revised Statutes 1873 all naturalization laws in effect at the date of the compilation were placed under Title XXX and Section 2169 thereof read: "The provisions of this Title shall apply to aliens of African nativity and to persons of African descent". This was evidently an error which was promptly corrected by the Act of February 18, 1875, Vol. 18, p. 318 U. S. Stats. at L., when said Section 2169 was amended by inserting in the first line after the word "aliens" the words "being free white persons and to aliens", thus making Section 2169 read as incorporated in the Revised Statutes of 1878: "Inasmuch as no alien may be naturalized except under such conditions and limitations as may have been provided by Congress and as Congress from the very first naturalization act passed in 1790 down through many succeeding acts until the year 1870 granted the privilege of naturalization only to aliens being free white persons" and then provided in Section 7 of the Act of July 1870 "that the Naturalization Laws are hereby extended to aliens of African nativity and to persons of African descent". The law undoubtedly then was that no person except a free white person, a person of Afri-

can nativity or African descent could be admitted to citizenship.

It was only for convenience that all the naturalization laws were assembled under one title in the Revised Statutes and Section 2169 was made to read "The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

Before the revision as afterwards only the persons named in Section 2169 might be admitted to citizenship. It is apparent that as all naturalization laws were included in Title XXX, in the Revision the phraseology adopted in Section 2169 was merely a convenient form of stating the then existing law and that there was no purpose to change the then existing law. It follows, therefore, that Section 2169 was merely declarative of existing law which placed a limitation, as stated, on persons who might be naturalized. Since, when adopted, said section limited the naturalization of aliens to the classes of persons named therein, there could be no enlargement of the classes who might be naturalized except by subsequent enactment of Congress, and Congress has never seen fit to make such enactment.

As in 1878 the naturalization of aliens was restricted to the classes named in Section 2169, there being no naturalization law not included in Title XXX, we cannot assume that the classes who may be naturalized have been enlarged by the passage of subsequent naturalization laws which do not mention

the subject but provide for a general rule of naturalization, the manner of naturalization and the procedure, in detail.

In providing under the Act of June 26, 1906, that *an* alien may be naturalized in the following manner and not otherwise, it cannot be held to mean that *any* alien may be so naturalized, but only an alien who, under existing law may be naturalized in the manner and under the conditions only as stated. If it had been intended to enlarge the classes of persons who might be naturalized under such act, it is fair to presume that Congress would have said "*any* alien may be naturalized in the following manner and not otherwise," and this would have been followed by a repeal of Section 2169.

The Act of June 29, 1906, did not touch or purport to touch the question of what classes may be naturalized, for that question was covered by Section 2169 and the fact that said section was not repealed as were certain other sections of Title XXX conclusively indicates that there was no intent to change the existing law as to who may be naturalized.

The Courts have recognized the fact that Section 2169 is not only a limitation on the unrepealed sections of Title XXX, but on all subsequent naturalization acts by numerous decisions.

The so-called Navy Act of July 26, 1894, was passed after the revision of 1878 and was never made a part of Title XXX, and yet in numerous cases the

Courts have held that applicants under said Act are subject to the restrictions of Section 2169.

Besso vs. *U. S.,* 178 Fed. 245,

In Re Alverto, 198 Fed. 688,

U. S. vs. *Balsara,* 180 Fed. 694.

In conclusion we wish to say that the Government neither palliates nor denies the noble characteristics of the Japanese race as portrayed by appellant's counsels but we respectfully submit that the argument would be more appropriate to the legislative department for its consideration than the judicial, as it was said in the case of *U. S.* vs. *Ginsberg,* referred to above, relative to the naturalization law:

> "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."

Respectfully submitted,

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No. 2890.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ROLLIE A. YORK and ED. KARR,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

On Writ of Error to the District Court of the United States for the Southern Division of the Northern District of California, First Division.

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Of Counsel.

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(See note at bottom of this page.*)

STATEMENT OF THE CASE.

The plaintiffs in error, Rollie A. York and Ed. Karr (hereinafter designated as "defendants") were

*NOTE: In referring to pages of the Transcript of Record, we refer to the large numbers on the extreme lower right hand corner of the pages in *blue ink,* and not to the typewritten numbers in the middle of the pages.

Furthermore, to assist and for the convenience of the Court, inasmuch as the Transcript of Record was not printed, owing to the indigence of the defendants, we have prepared an index of the witnesses who testified for the prosecution and for the defendants with the pages of their direct, cross and redirect examinations, which will be found in the Appendix to this Opening Brief.

convicted in the court below of the offense of conspiracy to violate a law of the United States as denounced by Section 37 of the Criminal Code. They were each sentenced to imprisonment in McNeil's Island, Washington, for the term of two years. (See Transcript of Record, p. 363.)

The indictment charged that they had conspired *to pass, not manufacture,* counterfeit five dollar gold pieces and alleged some eight overt acts in furtherance of the conspiracy. (Transcript of Record, pp. 2-8.)

They were recommended to the mercy of the court by the jury, but this recommendation was ignored by the trial Judge, who imposed the extreme penalty of two years' imprisonment prescribed by the statute. (See Transcript of Record, p. 364.)

The evidence against the defendants—of the existence of any conspiracy to pass counterfeit five dollar gold pieces—was purely circumstantial. There was no direct, nor, we add, even satisfactory evidence, of the passing, or attempting to pass, or possession of any counterfeit five dollar gold pieces, by either defendant, *with any intent to defraud* the persons named in the indictment.

It should be explained, at the very outset, that the counterfeit $5 gold pieces, which, it was claimed by the prosecution, the defendants had passed or attempted to pass on the two or three occasions developed by the evidence, were so perfect in their resemblance and similitude to the genuine coin that they easily deceived anyone.

Even cashiers of banks were imposed upon. As

Charles A. McCarthy, receiving teller of the Central National Bank in Oakland, testified: "Well, at our last report, the last half year that we turned in our annual report, we sent to San Francisco some $500 worth of these, or, rather, approximately $500, if they were good, but they were sent to the First National Bank in San Francisco, who took them to the Mint, I presume, and got there whatever gold value there was in them, and returned the same to us (To Mr. Preston): That came from our institution; yes. We had somewhere about approximately $500 worth of these, if they were in real value. Between, we will say, the middle of January—starting in about February or March of last year—and accumulating until about the first of July or the latter part of June; they were sent to San Francisco for collection, that is, we turned them over to them, and they apparently, I imagine, not knowing much about that—but our bank in San Francisco, our correspondent, must have brought them to the Mint, or some place, and got their gold value for them and returned the same to us. (To Mr. Woodworth): This was $500 for that one half fiscal year. To my knowledge, the coins that were found in the trays at different times, I would imagine there were sometimes three or four taken in in one day and discovered." (Transcript of Record, pp. 229-230, 232, 233, 234.)

Michael Finnell, a Captain of Police at Stockton, who searched and interrogated the defendants and then released them, testified:

"There was on my part considerable doubt as

> to the nature of this coin (referring to a $5 gold piece attempted to be passed in Stockton by defendant Karr on saloon keeper Eickhoff and afterwards passed by defendant Karr on another saloon keeper named Jones), as to whether it was genuine or counterfeit." (Transcript of Record, p. 115.)

This was after the coin had been subjected to the strictest scrutiny by the police officers at Stockton.

Therefore, we ask, if police officers, after a careful examination and even bank cashiers, could not tell if the coin was counterfeit and were imposed upon, why were not the defendants, men in the ordinary walks of life, also imposed upon?

A mass of evidence was permitted to be introduced, in an endeavor on the part of the prosecution to prove guilty knowledge or scienter on the part of both defendants.

Before the defendants could be convicted—and, this being a conspiracy charge, neither could be convicted without the other—the evidence, manifestly, must perforce establish beyond all reasonable doubt an intent to defraud—a guilty knowledge of the spuriousness of the coins—on the part of both of the defendants.

We do not believe that a perusal of the record in this case will satisfy this appellate tribunal that there was sufficient satisfactory evidence of any conspiracy between the defendants or of any intent to defraud on the part of both of the defendants as charged in the indictment.

Much incompetent, immaterial, irrelevant and highly prejudicial evidence was permitted to be introduced by the trial court. This was further aggra-

vated, to the substantial prejudice of the defendants, by grave acts of misconduct committed during the trial, such as permitting the jurors to experiment, in open court, over the protests of counsel for defendants, with articles *not admitted in evidence,* the experiments being undertaken by the jurors to determine whether a certain block of iron, claimed to have been found in the basement of one of the defendants' homes—defendant Karr—(long after he had moved away from there and long after the expiration of the alleged conspiracy) might be used in counterfeiting five dollar gold pieces.

In this connection, it should be impressed upon this Appellate Court, at the outset, that the indictment did not charge that the defendants had conspired *to make or to manufacture* counterfeit money.

Even Chief Secret Service Agent Moffitt conceded that the defendants had nothing to do with the making of the coins. He testified:

> "I said according to Mr. Foster—I was going on Mr. Foster's theory,—that is, from reading his report—Mr. Foster had reported these men had been engaged in the railroad business and did not think that they were skilful enough to make these coins. That was the theory that I was going on, but I believe that some other man had made the coins and that they were simply the tools of the maker and were passing it." (Transcript of Record, pp. 85-86, 298.)

Furthermore, the trial court committed grave and substantial error in stating in the presence of the jury, when counsel for defendants was endeavoring to have

a certain letter written by defendant York introduced in evidence as part and in explanation of a previous conversation called out by the prosecution in presenting its case in chief: "The Court: *My opinion is—it may be an old fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote;* it may be self-serving." (Transcript of Record, p. 236.)

These, and other equally, grave irregularities, combined with an entirely too broad and liberal admission of a mass of circumstantial, incompetent, irrelevant and immaterial evidence in favor of the prosecution, undoubtedly induced the jury, as we believe, to return a compromise verdict of guilty, recommending the defendants to leniency.

We confidently believe that a perusal of the far-fetched and flimsy mass of circumstantial evidence in the record will lead this Court to apply the well settled rule of Appellate Courts, in criminal cases, that "where all the substantial evidence is as consistent with innocence as with guilt, the Appellate Court should reverse a judgment of conviction."

Union Pac. Coal Co. v. *U. S.*, 173 Fed. 737;
Wright v. *U. S.*, 227 Fed. 855;
Isbell v *U. S.*, 227 Fed. 788.

In the case at bar, the substantial evidence is as consistent with innocence as it is with guilt, and, in our judgment, more consistent with innocence than with guilt and, for that reason, if for no other, the verdict should be set aside and a new trial granted.

At all events, we are convinced that the jury never would have returned the compromise verdict of "guilty with recommendation to the Court for leniency," save for the grave and highly prejudicial acts of misconduct committed during the trial. (Transcript of Record, p. 364.)

We set out, very briefly, an epitome of the indictment and evidence.

The indictment charges a conspiracy between the defendants to pass, *not to manufacture,* counterfeit five dollar gold pieces. No attempt was made by the prosecution to connect anyone else with the alleged conspiracy. (Transcript of Record, pp. 2-8.)

The indictment charges the conspiracy to have been formed and entered into on January 1, 1915, at Oakland, California. It sets out eight overt acts—committed—not by both of the defendants together—but by each of the defendants separately at different times and places, as follows:

(1)

By defendant *York,* attempt to pass on January 15, 1915, at Oakland, California, on Harry Collinbell, a bartender, a counterfeit five dollar gold piece. (Transcript of Record, pp. 3-4.)

(2)

By defendant *York,* the possession, on June 15, 1915, at Oakland, California, of one counterfeit five

dollar gold piece with intent to defraud Robert Mulholland, a saloon keeper. (Transcript of Record, pp. 4-5.)

(3)

By defendant *York,* passing on the same Robert Mulholland, on June 15, 1915, at Oakland, California, a counterfeit five dollar gold piece. (Transcript of Record, p. 5.)

> (Note: The last two overt acts just mentioned really relate to one and the same transaction, as, of course, in order to pass there must have been a possession, and simply serves to show to what extreme the prosecution went in carving up offenses and multiplying overt acts.)

(4)

By defendant *Karr,* attempt to pass, on July 9, 1915, on Robert Eickhoff, a saloon keeper, at Stockton, California, a counterfeit five dollar gold piece. (Transcript of Record, pp. 5-6.)

(5)

By defendant *Karr,* the possession, on July 9, 1915, at Stockton, California, of one counterfeit five dollar gold piece, with intent to defraud the same Robert Eickhoff, a saloon keeper at Stockton, California. (Transcript of Record, p. 7.)

> (Note: The two overt acts just mentioned really relate to one and the same transaction, as, of course, in order to pass there must have been a possession, and simply serves to show to what ex-

treme the prosecution went in carving up offenses and multiplying overt acts.)

(6)

By defendant *Karr,* passing, on July 9, 1915, at Stockton, California, a counterfeit five dollar gold piece on Newton Jones, a bartender. (Transcript of Record, pp. 6-7.)

(7)

By defendant *Karr,* the possession, on July 9, 1915, at Stockton, California, of one counterfeit five dollar gold piece, with intent to defraud the same Newton Jones, a bartender. (Transcript of Record, pp. 7-8.)

(Note: The two overt acts just mentioned really relate to one and the same transaction, as, of course, in order to pass there must have been a possession, and simply serves to show to what extreme the prosecution went in carving up offenses and multiplying overt acts.)

(8)

By defendants York and Karr, the possession, on July 9, 1915, at Stockton, Calfornia, of 27 counterfeit five dollar gold pieces with intent to defraud certain persons unknown. (Transcript of Record, p. 8.) This accusation is absurd, because neither had possession of any one of these 27 counterfeit coins unless we indulge in the wildest dreams of a detective's fancy.

It will be observed that each of these overt acts were alleged with all of the detail and particularity of executed felonies. In other words, the overt acts, as alleged, were consummated offenses committed by each

of the defendants separately in furtherance of the conspiracy.

The evidence discloses that Ed. Karr was 34 years of age (in 1915), a married man, having a wife and one child, and that he and the members of his family were and are persons of respectability in Oakland, California, where he resides. (Transcript of Record, p. 128.) He produced abundant testimony as to his character, which was not disputed by the prosecution.

He, at one time, was employed by the Southern Pacific Company as a brakeman and rose to the position of conductor, but severed his connection due to some infraction of their rules. Later on, he prepared to take the examinations to become a police officer of Oakland, successfully passed and became a member of the Oakland police force. He held this position for one month and then resigned, as the salary was only $100 a month and the work—that of being out at all hours of the night—not congenial. At the time of his resignation in 1915, the "jitney" business was just developing in Oakland and had assumed promising proportions, and he and the defendant York, a friend of his, put their savings together and invested in a "jitney"—needless to add, a Ford. At first, the venture proved remunerative, but too many others entering the field, there was a substantial falling off of patronage and after several months they gave up the business and eventually sold the Ford machine. (Transcript of Record, pp. 128-131.)

The other defendant, Rollie A. York, was 31 years of age (in 1915), also married and resided in Oak-

land, California. He also established his good character, which the prosecution was unable to dispute. He and the other defendant Karr had been friends for years. He also took the examinations to become a member of the police force in Oakland, successfully passed, and served for just one month, resigning from the force to enter the "jitney" business with the defendant Karr. At the time of the overt acts alleged against him he was living with his wife in Oakland and was engaged with his wife in obtaining subscriptions for the Examiner's "Orchard and Farm," being so successful that they were awarded a valuable prize for obtaining the fourth largest number of subscriptions. The fourth prize consisted of a piano. He also had, in the month of May, 1915, won $1250 in the lottery. (Transcript of Record, pp. 251-253.)

As stated, there was absolutely no evidence of any conspiracy. The overt acts charged against the defendants were either not proved or those that were proved against the defendant Karr as having taken place in Stockton, California, on July 9, 1915, were strongly consistent with the theory of the defense *that the defendant Karr did not know that the five dollar gold piece that he gave to the bartender Eickhoff was counterfeit and that he had no intent to defraud, and the same may be said of his paying the same coin to the bartender Newton Jones almost immediately afterwards.*

In other words, what looks like a formidable indictment, consisting of many overt acts, due to the carving up or multiplication of offenses on the part of the

prosecution, is, when analyzed, reduced to two overt acts against defendant York and two against the defendant Karr.

Briefly, the evidence, or alleged evidence, against defendant York upon the first overt act alleged in the indictment showed, that although the indictment charged that defendant York had, on January 15, 1915, at Oakland, California, passed on a barkeeper named Harry Collinbell a counterfeit five dollar gold piece, the prosecution attempted to show by the witness Collinbell that the transaction really took place on the last of June or the first of July, 1915, *fully six months later.* (Transcript of Record, pp. 50-51.)

The proofs, on behalf of the defendant York, were overwhelming that Collinbell must have been mistaken, as defendant York was not in Oakland the last of June or the first of July, 1915, but was in Santa Cruz, California, with his father, who is a prominent practicing physician there, and defendant York had been in Santa Cruz for some time previous for the purpose of going on a camping trip with his folks. This was established by the testimony of his father, of his wife, of the defendant Karr, who also had occasion to visit Santa Cruz at that time and registered with his wife at a hotel in Santa Cruz, the register of the hotel containing their original signatures being admitted in evidence and conceded by the prosecution; also by the witness Howard Emigh, who had occasion to repair the defendant York's machine which he had used in going from Oakland to Santa Cruz at that time; also by the testimony of Horace Snyder, a drug-

gist in Santa Cruz, who filled a prescription for Mrs. Karr at that time and place, Mrs. Karr having been taken sick after having reached Santa Cruz.

(Testimony of Horace Snyder, druggist in Santa Cruz, Transcript of Record, p. 227.)

(Testimony of Howard Emigh, garage man in Santa Cruz, Transcript of Record, pp. 243-244.)

(Testimony of J. M. York, physician in Santa Cruz, who prescribed for Mrs. Karr, Transcript of Record, pp. 244-245.)

(Testimony of Mrs. Irene Karr, wife of defendant Karr, Transcript of Record, pp. 246-247.)

(Testimony of Mrs. R. A. York, wife of defendant York, Transcript of Record, pp. 291-292.

(Testimony of defendant York, Transcript of Record, p. 258.)

(Testimony of defendant Karr, Transcript of Record, pp. 132-133.)

(Hotel registers in Santa Cruz, Transcript of Record, p. 133.)

(Prescription filled in Santa Cruz drug-store, Transcript of Record, pp. 227, 258.)

It would be doing violence to the testimony of reputable and disinterested witnesses to assume that it was not overwhelmingly established that defendant York was not in Oakland, California, at the time the bartender Collinbell, in his equivocating and vascillating testimony, claims he was.

The same is true with reference to the second and third overt acts charged against the defendant York—that of the *possession* and of the *passing* of the counter-

feit five dollar gold piece on one Robert Mulholland, a saloon keeper in Oakland. The overwhelming testimony shows that defendant York could not have *possessed* or *passed* this particular five dollar gold piece, because he proved a complete and perfect alibi, as previously stated.

We cannot refrain from calling this Appellate Court's attention to the unreliable character of Mulholland's testimony in seeking to fasten upon defendant York the taking by Mulholland of a counterfeit five dollar gold piece.

On cross-examination, he testified:

> "I am 23. I have been in the saloon business 3 years. I worked at the Acme saloon there for my grandfather previous to the time I acquired it. *My grandfather's name is Orlandi. He is dead. Well, I didn't pay much attention to the date of this transaction. At the time I didn't pay much attention. It occurred some time during the middle of last year. I am positive of that fact. It may have taken place on the 15th of June, as the indictment recites. I noticed that this coin was spurious at the moment I took it. Yes, I made change for this coin. I knew the coin was spurious, yet I gave them back the change. No, I was not alone in the saloon at the time. I had no assistant. There were two or three fellows in the front of the bar. Mr. Moffitt was not there. Mr. Moffitt comes in to take a drink, yes. Not very often. I might say maybe once or twice a week. Yes, he does not live very far from there. Yes, Mr. Moffitt and I are great friends. We have been for some years. He was the executor of my grandfather's estate. I have talked this matter over frequently with Mr. Moffitt. Mr. Moffitt has shown me photographs of these two men. And has asked me whether or not I could tell whether these were*

the same men. And having looked at the photographs I told him that they were. I told you I saw these gentlemen only once before seeing them in this courtroom. And that is the time they came in there. And I swear now positively that they were the gentlemen who passed the money at that time, about the 15th of June, 1915—about the 15th of June or the middle of June. I cannot possibly be mistaken. I never saw them before in my life, to my knowledge. I haven't seen them since. I identified them simply by the photographs that Mr. Moffitt, my bosom friend, exhibited to me, that is all. I did not say I passed this money on somebody else. The other fellow paid it out accidentally. The other bartender. He has not been indicted."

(Transcript of Record, pp. 47-48.)

These constitute all of the overt acts alleged against the defendant *York* as having been committed in Oakland, California.

The scene of operations next shifts, according to the indictment and evidence, to Stockton, California, and is claimed by the prosecution to involve chiefly the defendant *Karr* and transpired on July 9, 1915.

The evidence shows that the York and Karr families returned from Santa Cruz at the end of the first week in July and that on July 9, 1915, the defendant York, then being interested in a small house and lot in Tracy, California, where he had formerly resided when employed as a brakeman and conductor for the Southern Pacific Company, desired to go to Tracy to see a carpenter for the purpose of attending to some repairs required upon the house. Not wishing to go alone, he suggested to his friend Karr that he

accompany him, to which the latter consented. They went in the same "jitney" Ford machine to Tracy, but could not find the carpenter, as he was out of town. They visited several resorts and friends in Tracy. *There is no pretense whatever that while in Tracy any counterfeit five dollar gold piece was passed or attempted to be passed.* (Transcript of Record, pp. 260-263-264.)

Not being able to find the carpenter they were looking for, it was suggested that they take a short trip to Stockton where the defendant York had an acquaintance, a gentleman named Roy Gardner, a former fellow employee on the railroad with him, who, so York stated, might be useful in assisting him in getting further subscriptions for the "Orchard and Farm," in which he and his wife subsequently won, as already stated, the fourth prize for the fourth largest number of subscriptions. (Transcript of Record, p. 258.) They accordingly repaired to Stockton, arriving there about 6 o'clock; had a modest supper; listened to services being held by the Salvation Army, and then started down one of the main streets of Stockton to look up York's friend, Roy Gardner. (Transcript of Record, pp. 260-263-264.)

The latter was employed at that time, and had been for some time previous, as a bartender in one of the saloons in Stockton. He testified that he was not working on that particular evening, on account of ill-health. (Transcript of Record, pp. 241-242.)

York could not recall in which particular saloon Gardner was employed, and there being quite a num-

ber of such resorts in Stockton, it was agreed that Karr should look on one side of the main street, and York on the other.

Karr, in his quest for Gardner, entered the saloon known as Bronx Bar and, preparatory to inquiring for the bartender Gardner, asked for a drink from the witness Eickhoff and deposited a five dollar gold piece on the counter.

The bartender Eickhoff took it up and, after examining it, stated it did not look good to him and he preferred not to take it. Karr very naturally asked him what the trouble with it was and Eickhoff, using a small scale or coin weighing machine, pronounced it as somewhat light. At any rate, a discussion arose between them as to whether the coin was genuine or counterfeit, Karr, who, as the evidence shows, was of an opiniative nature, insisting that it was good, and the bartender Eickhoff as stubbornly insisting that it was not. Their discussion and examination of the coin seems to have been participated in by bystanders, some of whom agreed with Karr and others with the bartender. At any rate, the bartender finally refused to take the five dollar coin, and Karr had his drink, paid for it with other money and left the place. *Still of the opinion that the coin was good and determined to test its genuineness, he walked right across the street to another saloon—the Rex Bar—where Newton Jones was a bartender, asked for a drink, threw down the same five dollar gold piece which had been rejected by Eickhoff, and Newton Jones took it up, considered it was all right, put it in his till and gave*

Karr the change. (Transcript of Record, pp. 135-140.)

Thereupon Karr left that saloon *satisfied that the coin was good and that Eickhoff was mistaken, in which* view he was subsequently confirmed by the police officers in Stockton who examined the same coin and released the defendants.

He then rejoined York. Meanwhile, the latter had looked in vain for his friend Gardner. He had visited a number of saloons, but did not go in, merely satisfying himself by throwing open the swinging doors and looking in at the bartenders and, not recognizing his friend among them, withdrew from the places without going through the "civility" of taking a drink. (Transcript of Record, pp. 263-264.)

York and Karr again discussed the whereabouts of Gardner and separated again for the purpose of going to other places to locate him. It is not pretended that York passed or attempted to pass *on any one* at Stockton any counterfeit five dollar gold piece, nor is it claimed that Karr passed or attempted to pass *any other gold coin.*

It developed that when Karr was having the discussion with the bartender Eickhoff, one, of the employees of the place (named Louis Stemmer), who was not then on duty, took it upon himself to become a sleuth and follow Karr, and, in his perambulations, met one of the detectives of the police force of Stockton, J. T. McKenzie, and told him of his suspicions and these two men

thereafter watched the movements of both York and Karr. After following them for awhile (Transcript of Record, pp. 21-25), Karr was first arrested and taken to the police headquarters on suspicion and was there searched and closely interrogated. No counterfeit coin was found on him and he did not hesitate to give his correct name and to tell of his connections in Oakland and elsewhere. Meanwhile, the police officers sent for the coin which Karr had given to the bartender Newton Jones. This coin was examined by the police officers and detectives and was of such perfect make and so genuine in appearance, weight and sound that the police officers themselves questioned whether it was counterfeit or not (Transcript of Record, pp. 115, 143-145.)

While Karr was under arrest and being interrogated, York was also arrested on suspicion and at first kept apart from Karr. He was searched and no counterfeit money was found on him and after he was thoroughly examined by the police officers, both he and Karr were released (Transcript of Record, pp. 265-266). It was suggested by the police that they might return in the morning and take the five dollar gold piece, which had been given by Karr to Newton Jones, to some bank and have it tested to determine whether it was genuine or not. The defendants left and, seeing no occasion to remain in Stockton all night, especially after their unpleasant experience, went back to their machine and left Stockton and came back to Oakland. It should be added that the defendant Karr expected his old father (whom he had

not seen for many years) on the following morning from Tennessee, and had promised to take him to the Exposition, and was naturally anxious to get back. (Transcript of Record, pp. 133-134, *147*.)

Some time—perhaps an hour or so—after the defendants had been released by the police officers at Stockton, it suddenly occurred to one of the Stockton sleuths to search the lavatory in the rear of Lonjer's saloon. *Why search this particular saloon and not the other saloons visited by York and Karr is not explained.* This was done but nothing was found concealed there by the officers who made the search (Transcript of Record, p. 37). After they had left, it suddenly also suggested itself to the mind of a bartender in that saloon, by the name of Guy Campbell, to make a search for himself and he claims to have discovered there a small sack which was found to contain 27 counterfeit five dollar gold pieces. It was upon this discovery that was predicated the overt act by both the defendants of the possession of 27 counterfeit five dollar gold pieces (Transcript of Records, pp. 40-43). At the time of this discovery, both of the defendants were miles away from Stockton and from this particular saloon.

It is conceded by the prosecution that the defendant Karr never went in that saloon, so that a joint possession of the 27 counterfeit five dollar gold pieces could not be charged against him. It was claimed, however, that the defendant York had visited that place and although he did not take a drink there and did not pass or attempt to pass a five dollar gold piece

there, it was the far-fetched contention of the prosecution that York must have placed this small sack containing the 27 coins in the lavatory. Both defendants stoutly denied that they ever possessed 27 or any other number of counterfeit five dollar gold pieces, or that they knew anything about them or that they placed them in the lavatory in the rear of Lonjer's saloon.

Thus, we see, that the case is purely one of circumstantial evidence—circumstances, we add, of a most far-fetched, strained and chimerical nature.

The defendants, although these matters in Stockton happened on July 9, 1915, were not arrested until the following *October, 1915*. The Government officers—the secret service operatives—admitted that they could have arrested them at any time after July 9, 1915, and that they were held under close surveillance from that time until they were arrested and even afterwards; but, for the purpose of endeavoring to trap the defendants and catch them in the act of passing other counterfeit five dollar gold pieces, they permitted them to remain at large until October following, *and yet during all that time not a single violation of law could be charged against either of them* (Transcript of Record, pp. 298-300.)

Meanwhile, it is most significant in favor of the innocence of the defendants that they did not seek to escape and there is not the slightest pretense that they ever passed or attempted to pass thereafter at any place during all of their peregrinations any spurious coin of any denomination.

They returned to Oakland after leaving Stockton, California, on July 9, 1915, and remained there without the slightest attempt at concealment. Later on, in August, 1915, finding they could not obtain employment on the railroads of the Southern Pacific Company, because their standing was not good with that company, they traveled from San Francisco to one place and another in different states, seeking employment from railroads other than the Southern Pacific Company and finally obtained positions as brakemen in Ohio. When arrested, the defendant York had obtained a position in Salt Lake on a railroad running from there to Ogden and vicinage, while the defendant Karr was railroading in Ohio.

It appeared in evidence that some time during the month of September, 1915, and previous to the arrest of the defendants, Harry M. Moffitt, Chief Secret Service Operative on the Pacific Coast, had visited defendant York's brother, O. S. York, who was then on the Oakland police force, and had told him that he suspected that his brother, the defendant York, and Ed. Karr had been passing counterfeit five dollar gold pieces and asked the brother York to write to the defendant York with the end in view that the latter should confess and furnish evidence to Secret Service Agent Moffitt as to the manufacturers of these counterfeit five dollar gold pieces (Transcript of Record, pp. 83-93). The brother York complied with this request and wrote a letter, the contents of which he was permitted to testify to, the original having been destroyed (Transcript of Record, pp. 234-

236.) *This letter reached the defendant York and he immediately replied, protesting his innocence and spurning the offer made by the Secret Service Agent.* Although the trial Court permitted the prosecution, in their case in chief, repeatedly to refer to conversations relating to this letter written by the defendant York to his brother and permitted defendant York's brother to testify to the conversation he had with Secret Service Agent Moffitt and to state the contents of the letter he wrote to his brother (the defendant) on the subject, the trial Court refused to permit the defendant, as a part of these conversations, to show the reply to the letter written by him to his brother. The jury was left to infer whether the reply contained damaging admissions or not.

Furthermore, after the defendant Karr had moved away from the house rented by him from his father-in-law, H. C. Poole, at 4405 West Street, Oakland, and fully two months after the house had been vacated by Karr and the members of his family and had been rented to some itinerant Italians, only one of whom could be produced at the trial, the others having vanished, the trial court permitted the prosecution to show that in the month of September, 1915, certain Secret Service men went to this house, occupied by the mysterious foreigners just referred to who seemed to have no means of livelihood, and in the basement, which was open and accessible to anybody, found articles which they claimed indicated the former existence of a counterfeiting plant in the basement.

This proof was admitted over objection by counsel for defendants. The alleged plant in the basement was long subsequent to the consummation of the conspiracy on July 9, 1915, if any conspiracy ever existed at all. Even so, there was no charge of conspiracy *to manufacture.* A mere view of the premises —of the basement—would have convinced any jury or person with eyesight that that modest and humble home was never used, *and could not be,* for any such purpose, *that it was a physical impossibility to do so.* Two separate requests were made of the trial court on the part of the defendants to view these premises but they were denied. Counsel for the defendants charged that the Secret Service Agents, in their anxiety to convict these defendants, on whose trail they had been for three full months without arresting them, hoping then to catch them in some flagrant violation of the law, *in which they did not succeed,* had deliberately planted on these premises various articles acquired from other counterfeiting raids so as to strengthen their case.

It should be further stated that the evidence of the Secret Service Operatives showed that the counterfeit five dollar gold pieces were splendid imitations, consisting to a large extent of genuine gold and material, and would deceive anyone, and that large numbers of these had been in circulation for a long time and that they had not been able to apprehend anyone until the arrest of these defendants (Transcript of Record, pp. 58, 59, 78, 80, 115).

Secret Service Agent Moffitt admitted that:

> "It is a fact that I have been requested by my department to make a *superhuman* effort, almost, to locate the manufacturer of these clever coins." (Transcript of Record, p. 298.)

The prosecuting attorneys seem to have become imbued with the same desire, and, to their *"superhuman"* effort to obtain a conviction, the grave irregularities and acts of misconduct on their part and on the part of the jury may be attributed.

We have simply stated the substance of the testimony but an examination of the record will bear us out as to its substantial correctness.

ARGUMENT.

Trial Court Committed Grave Error in Practically Compelling Defendant York to Take Stand.

The first assignment of error urged is assignment number XXXIII (Transcript of Record, p. 385), as follows:

> "The Court erred in stating in the presence of the jury as follows:
> "'THE COURT: We are running up against that letter again.
> "'MR. WOODWORTH: I know we are.
> "'THE COURT: *My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote;* it may be self-serving.'"

This statement of the trial Judge constitutes reversible error. If anything is well settled in our criminal law, it is that a trial judge should not make the slightest allusion to a defendant testifying in his own behalf. This important and substantial right of the defendant is guaranteed by the Constitution of the United States and expressly reaffirmed in an Act of Congress.

Article V of the Amendments to the Constitution of the United States expressly provides that:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

The Act of Congress of March 15, 1878 (20 Stat. at L. 30, Chap. 37), provides:

> "That in the trial of all indictments, information, complaints, and other proceedings against

persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

Boyd v. *United States,* 116 U. S. 616.

It is elementary and fundamental law of the land that a person accused of crime is presumed to be innocent.

Coffin v. *United States,* 156 U. S. 432;
Kirby v. *United States,* 174 U. S. 47.

The burden of proof is always upon the prosecution. This burden of proof never shifts in a criminal case. The issue is always single, and it relates, not to the defendant's *innocence,* but to his guilt.

Coffin v. *United States,* 156 U. S. 432;
McKnight v. *United States,* 115 Fed. Rep. 972;
Balliet v. *United States,* 129 Fed. Rep. 689;
People v. *McWhortar,* 93 Mich. 641;
Baker v. *State,* 80 Wis. 421.

The circumstances under which the trial Judge made the above damaging statement against the defendant York were as follows:

In putting in their case in chief, the prosecution was permitted to introduce portions of certain conversations had between the Secret Service Agents and the defendants York and Karr relating to a letter practically asking for a confession which the defend-

ant York's brother (O. S. York) was induced to write to the defendant York by and at the request of Chief Secret Service Agent Moffitt. The prosecution having been permitted, in its case in chief, and in the direct examination of its witnesses, as part of certain conversations, to show the existence of the letter sent by the defendant York to his brother O. S. York in reply to the latter's letter to him at the instigation of Secret Service Agent Moffitt, counsel for the defendants quite naturally endeavored to introduce in evidence the reply sent by the defendant York to his brother, so as to remove from the minds of the jurors any impression the testimony and attitude of the prosecution might have created that any inculpatory or incriminatory admissions had been made by defendant York in this written reply. Counsel for the defendants repeatedly offered the reply of defendant York whenever the opportunity presented itself. It was during the examination of O. S. York, the defendant's brother, who was called as a witness on his behalf, that counsel for the defendants again offered the reply letter in evidence. He did so after the trial Court had permitted the witness O. S. York to testify that the letter written by him to the defendant York was written at the request of Secret Service Agent Moffitt, and even went so far as to allow him to state the contents of the letter he sent to defendant York, "the letter itself apparently having been destroyed" (Transcript of Record, p. 235).

The trial Court having permitted the witness O. S. York (defendant's brother) to testify to the contents

of the letter which he had sent to his brother at the request of Secret Service Agent Moffitt, counsel for defendants brought out the fact from the witness that he had received a reply from his brother, defendant York, and thereupon the record shows the following proceedings took place:

"Q. Did you receive any return from it? A. I did.

"Q. From whom?

"THE COURT: We are running up against that letter again.

"MR. WOODWORTH: I know we are.

"THE COURT: *My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving.*

"MR. WOODWORTH: *We will put Mr. York on the stand in order to get the record straight.*

"Q. Did you receive an answer to this letter?

"MR. PRESTON: He has already answered that. His answer is yes.

"MR. WOODWORTH: I now show you a letter addressed to O. S. York, 5333 James Avenue, Oakland—this is the envelope, and I also exhibit you the letter. A. This is the envelope.

"MR. PRESTON: The envelope containing the reply to your letter to which we objected a moment ago.

"THE COURT: It may be identified.

"MR. PRESTON: It is already identified.

"MR. WOODWORTH: I offer it for identification.

"Q. Is this the letter? Just look at the inside. A. Yes, that is it.

"Q That is the envelope? A. Yes.

(The letter is marked "Defendant's Exhibit 1 for identification.)

"MR. PRESTON: Q. Was it October or September that you wrote the letter? A. I had writ-

ten the letter about two days after the interview with Mr. Moffitt.

"Q. What month was it? A. September, about the 6th.

"MR. WOODWORTH: You said in your original testimony October. Was that an error? A. It was about two days after—a day after or the following day, possibly.

"MR. WOODWORTH: The letter having been marked for identification, we offer it in evidence.

"MR. PRESTON: To which we object on the ground it is a self-serving declaration by the defendant in his own interest, and not admissible.

"THE COURT: *The objection is sustained.*

"MR. WOODWORTH: *Exception.*"

(Transcript of Record, pp. 236-237.)

We submit that the remarks and ruling of the trial Court constitute substantial and reversible error. *The defendant York was practically driven upon the stand,* as was appositely stated by Circuit Judge, now Mr. Justice, Day, writing the opinion of the Circuit Court of Appeals for the Sixth Circuit, in the case of *McKnight* v. *United States,* 115 Fed. 972, *982-983.* As was said by counsel for defendant York, when the trial Judge made the above damaging remarks, for the purpose of softening their damaging effect: "We will put Mr. York on the stand in order to get the record straight" (Transcript of Record, p. 236). What else could any attorney defending his client's liberty do or say under the circumstances? To have remained silent and permitted the remarks of the trial Court to pass by unnoticed would have been suicidal. To keep the defendant York off the witness stand, after the trial Court's remarks, would have been equally disastrous.

Counsel for defendant York, acting on the spur of the moment, did the only thing he could, to assuage the pernicious effect of the trial Court's remarks.

As was well said in *McKnight* v. *United States, supra,* of a substantially similar situation:

> *"Nor does it make any difference that the defendant afterwards testified. As has been said in some authorities, after allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him from his silence, when the law gives him the right to speak.*
>
> *"We are of the opinion that what was said by the trial judge in response to the objection of counsel as to the right of the defendant to testify was not cured by any subsequent statement to the jury upon that subject."*

In that case, it appeared that the court said:

> "The Court: That is a question of proof, entirely. Counsel cannot testify for the defendant. Col. Breckenridge: No one can make answer for the defendant but the defendant himself. The Court: *He can testify in rebuttal to this proposition.* Col. Breckenridge: He can do more than that, and we object to the statement as to his right to testify. The Court: *I did not mean he could testify in person,* but he can introduce testimony in rebuttal of the proposition. (*And thereupon the jury were told by the court to disregard the statement first made.*)"

The Circuit Court of Appeals said, of the language used by the trial judge in that case:

> "The Act of Congress of March 16, 1878, provides:

" 'That in the trial of all indictments, infromation, complaints and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States Courts, territorial courts and courts-martial, and courts of inquiry, in any state or territory, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such a request shall not create any presumption against him.'

"The Act was under consideration in the case of *Wilson* v. *U. S.,* 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. In that case the comprehensive opinion of Mr. Justice Field leaves little to be added in a discussion of the provisions and scope of this act. The act was passed in order to give the defendant the privilege denied him at the common law of testifying in his own behalf. It recognized that, while such a statute might be available in the vindication of the innocent, it does not permit enforced testimony from one on trial for an offense. It is distinctly provided that a failure to testify should not create any presumption against the defendant. In the case of *Wilson* v. *U. S., supra,* Mr. Justice Field said:

" 'To prevent such presumption being created, comment—especially hostile comment—upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.'

"In many of the States it is especially provided that no mention shall be made of the failure of the accused to testify. This provision is not in the Federal statutes, but, as the Supreme Court has construed it, it is only available to the defendant *if all reference thereto is withheld.* The reference to the right of the defendant to testify where he does not see fit to avail himself of the privilege puts him in a position where the jury will draw inferences against him from his silence, and the

statute *which was intended as a shield for protection will be turned into a weapon of attack in establishing his guilt.* There are two lines of decisions in the State courts arising upon facts disclosing a reference to this right of the defendant to testify by the court or prosecuting attorney. One line of cases holds that, when any reference has been made in the presence of the jury to the fact that the accused may justify, the error is *irretrievable, and no subsequent instruction can dispel the effect of the allusion.* In the very instruction not to draw inferences from the silence of the accused, the fact is brought to the minds of the jury that he may, if he will, testify in his own behalf. Another line of cases holds that when the jury are told, in clear and emphatic terms, that no inference can be drawn against the accused because of his failure to testify in his own behalf, this dispells the effect of the illusion, and the error is cured. In the Wilson case, *supra,* while the question was not directly before the court as to whether such an instruction would cure the error, Mr. Justice Field said:

"'It (the Court) should have said that counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify.'

"If this will prevent a reversal, where unfortunately reference is made to the right of the defendant to testify in his own behalf, we do not think the record discloses in this case such correction of the impression as must have been left upon the jury by the statement of the judge that the defendant might testify in rebuttal. The jury was not told specifically what the statement first made was, and, if the jury understood the court to refer to the right of the defendant to testify, they were not told, as Mr. Justice Field says is the duty of the court under such circumstances, in clear and emphatic terms, that no importance what-

ever could be attached to the failure of the defendant to testify. *Nor does it make any difference that the defendant afterwards testified. As has been said in some authorities, after allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him from his silence, when the law gives him the right to speak.*

"WE ARE OF THE OPINION THAT WHAT WAS SAID BY THE TRIAL JUDGE IN RESPONSE TO THE OBJECTION OF COUNSEL AS TO THE RIGHT OF THE DEFENDANT TO TESTIFY WAS NOT CURED BY ANY SUBSEQUENT STATEMENT TO THE JURY UPON THAT SUBJECT."

When an error is shown in a criminal case, it will be *presumed to have been hurtful to the party against whom it has been committed* until it appears to have been rendered innocuous.

Miller v. *Ter. of Okla.,* 149 Fed. 330;
Pettine v. *Ter. of New Mexico,* 201 Fed. 492.

As was well said in the latter case, by the Circuit Court of Appeals for the Eighth Circuit:

"The legal presumption is that error produces prejudice, and it is only when the fact so clearly appears to be beyond doubt that an error challenged did not prejudice, and *could not have prejudiced,* the complaining party, that the rule that error without prejudice is no ground for reversal is applicable."

Citing:

Deery v. *Cray,* 5 Wall. 735, 807, 808, 18 L. Ed. 653;

Peck v. *Heurick,* 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302;
Smith v. *Shoemaker,* 17 Wall. 630, 639, 21 L. Ed. 717;
Moores v. *Bank,* 104 U. S. 625, 630, 26 L. Ed. 870;
Gilmer v. *Higley,* 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62;
Railroad Co. v. *O'Brien,* 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299;
Mexia v. *Oliver,* 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602;
Railroad Co. v. *O'Reilly,* 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006;
Railroad Co. v. *McClury,* 8. C. C. A. 322, 325, 326, 59 Fed. 860, 863;
Association v. *Shryock,* 20 C. C. A. 260, 114 Fed. 458;
Armour & Co. v. *Russell,* 75 C. C. A. 416, 144 Fed. 614, 615, 6 L. R. A. (N. S.) 602;
People v. *Becker,* 104 N. E. Rep. 396.

When error is apparent in the record, it is presumptively injurious to the party against whom it has been committed, unless it appears *beyond doubt* that it did not and could not prejudice his rights.

Sprinkle v. *U. S.,* 150 Fed. 56, *59,* s. c. 205 U. S. 542, 51 L. Ed. 922;

"In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception." (Citing: *Wiborg* v. *United States,* 163 U. S. 632, 659, 41 L. Ed. 289, 299, 16 Sup. Ct. Rep. 1127, 1197.)

Crawford v. *United States,* 212 U. S. 183, 194, 53 L. Ed. 465, 470.

"It is the rule of law of this jurisdiction, often repeated, that, when error is apparent in the record, it was presumptively injurious to the party against whom it was committed, *'unless it appears beyond doubt that the error did not and could not prejudice the rights of the party.' Vicksburg R. R. Co.* v. *O'Brien,* 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 29; *National Biscuit Company* v. *Nolan,* 138 Fed. 9, 70 C. C. A. 436; *State* v. *Russell,* 90 Iowa, 569, 58 N. W. 915, 28 L. R. A 195; *People* v. *N. Y. C. Railway,* 29 N. Y. 430; *State* v. *Cooper,* 45 Mo. 64.

"Without discussing the question suggested as to whether or not there was sufficient exception saved to this instruction, it is sufficient to say that in a criminal case where a plain error is committed in a matter vital to the defendant, especially in a case like this, where the defendant received the severe punishment of one year and six months in the penitentiary in addition to the fine, it is the province of the Appellate Court to correct it. (Citing: *Wiborg* v. *United States,* 163 U. S. 633, 656, 16 Sup. Ct. 1127, 41 L. ed. 289; *Clyatt* v. *United States,* 197 U. S. 207, 221, 222, 25 Sup. Ct. 429, 49 L. Ed. 726.)"

Williams v. *U. S.,* 158 Fed. 30, *36.*

II.

Trial Court erred in refusing to admit the letter written by defendant York in reply to the letter received by him from his brother, written by the brother to him at the instigation of Secret Service Agent Moffitt, especially where the Court had permitted the contents of the letter written by the defendant's brother to be introduced in evidence, and had also permitted the Government witnesses, on the prosecution's case in chief, to testify to portions of conversations involving the letter written by defendant York's brother at the instigation of Secret Service Agent Moffitt.

The refusal of the trial Court to permit defendant York to introduce in evidence his reply letter (see Defendants' Exhibit 1 for identification, Transcript of Records, p. 406; see Appendix for complete copy of exhibit), is covered by assignment of error number XXXI, which is as follows:

> "The Court erred in refusing to admit in evidence, during the examination of the defendant Karr, the letter written and sent by the defendant Rollie A. York to his brother O. S. York, which said letter was marked 'Defendant's Exhibit 1 for identification.' "

The following assignments of error also relate to substantially the same ruling:

(Assignment of error No. XXXIII):

"The Court erred in stating in the presence of the jury as follows:

> " 'THE COURT: We are running up against that letter again.
>
> " 'MR. WOODWORTH: I know we are.

"'THE COURT: My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving.'" (Transcript of Record, p. 407.)

(Assignment of error No. XXXIV):

"The Court erred in refusing to admit in evidence, during the examination of the witness O. S. York, the letter written and sent by the defendant Rollie A. York to his brother O. S. York, which said letter was marked 'Defendant's Exhibit 1 for identification.'" (Transcript of Record, p. 407.)

(Assignment of error No. XXXVII):

"The Court erred in refusing to admit in evidence, during the examination of the defendant York, the letter written and sent by the defendant York to his brother O. S. York, which said letter was marked 'Defendant's Exhibit 1 for identification.'" (Transcript of Record, p. 408.)

The reasons given by the trial Court were two-fold: (1) "That the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote"; and (2) "It may be self-serving." (Transcript of Record, p. 407.)

As to the first reason for its ruling, we have already argued, and again submit, that the trial Court erred and violated one of the most substantial and fundamental rights of a defendant.

As to the second ground, while it may be conceded that self-serving statements are not in general admissi-

ble, still they are admissible when the *prosecution produces the conversation in which they are contained.*

The rule is well settled that, "when statements concerning admissions are received against defendant, *he may prove his self-serving statements in connection therewith,* by reason of the rule admitting the *whole conversation.*"

12 Cyc. 427;
Burns v. *State,* 49 Ala. 370;
People v. *Estrado,* 49 Cal. 171;
People v. *Farrell,* 31 Cal. 576;
Walker v. *State,* 28 Ga. 254;
Morrow v. *State,* 48 Ind. 432;
McCulloch v. *State,* 48 Ind. 109;
State v. *Travis,* 39 La. Ann. 356, 1 So. 817;
State v. *Napier,* 65 Mo. 462;
State v. *Branstetter,* 65 Mo. 149;
State v. *Patterson,* 63 N. C. 520;
Shackelford v. *State,* 43 Tex. 138;
Lancaster v. *State,* (Cr. App. 1895) 31 S. W. 515;
Rogers v. *State,* 26 Tex. App. 404, 9 S. W. 762;
Bonnard v. *State,* 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431;
Shrivers v. *State,* 7 Tex. App. 450;
State v. *Mahon,* 32 Vt. 241;
Sager v. *State,* 11 Tex. App. 110.

Secondly: The reply letter of the defendant York should have been admitted under the rule that where the evidence shows that a letter of accusation is sent to a defendant and received by him and answered or acted upon by him, he is entitled to show his answer or declaration even though it be self-serving.

People v. *Colburn,* 105 Cal. 648, 651;
Crawford v. *U. S.,* 212 U. S. 183, 199.

Thirdly: The reply letter should have been admitted for the purpose of impeaching the testimony of the prosecution's witnesses Moffitt and Foster, who were permitted to give their recollections of what the defendant York told them he had stated in answering his letter to his brother.

As was said by the Supreme Court of the State of California in *People* v. *Estrado,* 49 Cal. 171, *173*:

> "It was not error to permit *both statements* to go to the jury, that by *comparison of the one with the other it might be ascertained how far the allegations of Cotta were admitted by Estrado to be true.* The statement of Cotta, however, so far as it was contradicted by, or was irreconcilable with that of Estrado, was not evidence against him, and if Estrado's statement in respect to the actual conflict was correct, he was innocent of any crime. It cannot be assumed that the statement of Cotta, *where denied by the defendant,* had any appreciable weight with the jury."

On any one, or more, or all, of the grounds above stated, the reply letter of defendant York should have been admitted.

The prosecution *produced the conversation* in which the Government witnesses were permitted to testify to that *portion of the conversation* which related to the *sending of a letter to defendant York by his brother at the request and instigation of Secret Service Agent Moffitt and to its subsequent destruction by the defendant York.*

Thomas B. Foster, a Secret Service Agent, was asked by the prosecution on direct examination what

the defendant York said when arrested and to state the conversation on that subject:

> (MR. PRESTON): "Q. Did Mr. York, at the time you made the arrest, say anything to you about—ask you anything about what you arrested him for? State the conversation on that subject, if any." (Transcript of Record, p. 56.)

The witness thereupon proceeded to detail a portion of the conversation, and, in doing so, stated:

> "I asked Mr. York what he had done with the letter that had been written him by his brother with reference to the cases, and he said he *had destroyed it.*
>
> "Q. Where did he say he was at the time he received the letter from his brother? A. He was in Columbus, Ohio, and *he destroyed it* either there or after he left Columbus.
>
> "Q. Did he tell you what the subject matter of that letter was, or any part of it? A. No, he did not tell me what it was.
>
> "Q. Has he a brother? A. I am informed that he has.
>
> "Q. What are his initials? A. O. S.
>
> "Q. Where does he live? A. He lives in Oakland.
>
> "Q. A police officer? A. Yes." (Italics ours.)
>
> (Transcript of Record, p. 58.)

Therefore, the conversation with reference to the letter in question was brought out by the prosecution on their case-in-chief and upon the direct examination of their own witness.

On cross-examination, the witness Foster was per-

mitted to give his version of the response the defendant York had written to his brother, as follows:

"Q. Now, you have stated that Mr. York told you that he had received a letter from his brother? A. Yes. * * *

"Q. Did you ever receive a reply to that letter—I have made this statement rather inaccurately—did Mr. York tell you that he had ever written a response to that letter? A. My recollection is that he did. * * *

"Q. Did Mr. York tell you what answer he had made to the letter of his brother?

"MR. PRESTON: To that we object on the ground it is not cross-examination.

"MR. WOODWORTH: Yes; you asked him about this letter, Mr. Preston.

"MR. PRESTON: I asked him about *destroying a letter.*

"MR. WOODWORTH: I am talking about *the same letter.*

"A. I think if my recollection serves me correctly, *Mr. York said that he had nothing to say regarding the counterfeiting matter other than what the secret service already knew.*

"*Q. That is the only answer he made to you?*

"*A. That is my recollection of it; that is the purport of it, anyhow.*

"*Q. That was with reference to the contents of that letter?*

"*A. Yes.*

"*Q. Of the letter which he wrote to his brother in answer to the one his brother sent?*

"*A. Yes.*

"MR. PRESTON: *Q. Do I understand you to say that Mr. York told you that the letter contained nothing more than the secret service already knew?*

"*A. Yes.*

"*Q. What was there about the letter—did Mr. Moffitt write him a letter?*

"A. Mr. Moffitt wrote—he did not write a letter.

"Q. What did you mean a while ago by saying Mr. Moffitt wrote a letter?

"A. No. Mr. O. S. York wrote a letter, as I understand it, after Mr. Moffitt had seen him.

"MR. WOODWORTH: In other words, Mr. O. S. York, a brother of the defendant, wrote a letter to the brother at the instance of Mr. Moffitt; is that not the fact?

"A. I don't know whether that is the fact or not. I was not there, Mr. Woodworth.

"MR. WOODWORTH: Very well.

"MR. PRESTON: Mr. York's brother wrote that letter, Mr. Moffitt did not write it?

"A. That is my information. This is all hearsay, as far as that is concerned.

"MR. WOODWORTH: We will put Mr. Moffitt on the stand. At this time I will ask these gentlemen to produce all of these letters which they received from Mr. Karr or Mr. York.

"MR. PRESTON: As far as I am concerned, I have no objection to that."

(Transcript of Record, pp. 61-62.)

When Chief Secret Service Agent Moffitt was placed on the stand by the prosecution he admitted that the letter from the defendant York's brother to the defendant York had been written at his instance and that he had the answer of the defendant in his possession, which he produced in court, but the court declined to admit the letter upon the grounds and for the reasons above stated.

The record shows that it was the prosecution that *again brought out the subject of the letter in question during their direct examination of Chief Secret Service Agent Moffitt.*

(MR. PRESTON): "Q. Did you say anything to Mr. Karr about the receipt of a letter? A. I did.

"Q. What was that? A. I asked him if Mr. York had received a letter from his brother and he said he had. I said, 'Did you see the letter' and he said 'Yes.' I asked him what the contents were and he said it was relating to a converation that I had with his brother in Oakland about October 4, or at least September 4.

"Q. Did he say anything about whether or not this Stockton case had been taken up by the authorities here? A. Yes.

"Q. What did he say in that connection?

"A. Well, he said York had written his brother a letter and in reply—

"MR. WOODWORTH: Q. What is that?

"A. He said that York had written his brother a letter in reply to the one he had received, a registered letter, I believe."

(Transcript of Record, p. 78.)

On cross-examination, he testified:

"Q. Now, you have spoken of a conversation you had with Mr. Karr with reference to a letter which had been received by Mr. York. I will ask you, did you ever see that letter received from Mr. York's brother? A. Which Mr. York have you got reference to? Q. I have reference to the brother of the defendant? A. Never saw it, no.

"Q. You never saw the letter? A. I never saw it.

"Q. You have not seen the letter to this date?

"A. I have never seen that letter, no.

"Q. Do you know where that letter is? A. I don't know. I have seen the letter written by the defendant to his brother, but not the letter written by the defendant's brother to the defendant.

"Q. All right. Then you have never seen the

letter written by Mr. York's brother, the defendant's brother, to Mr. York? A. Never.

"Q. Did you ever have a conversation with Mr. York, the defendant, with reference to that letter? A. I did.

"Q. What was that conversation? A. Well, he simply said that his brother had written him telling him I had been to see him, and I asked him where the letter was and he said that he had not it.

"Q. Did he say what he had done with the letter?

"A. I don't remember. Some one of the two said that the letter was torn up.

"Q. Now, did you ever see the letter which Mr. York's brother wrote at your instance? A. Not at my instance, no.

"MR. PRESTON: To which we object upon the ground it is assuming a fact not in evidence.

"MR. WOODWORTH: We will show that.

"Q. Did you have some interview with Mr. York's brother with reference to the defendant? A. I did.

"Q. When was that? A. Do you want me to relate the whole affair?

"MR. PRESTON: Q. If you are going to relate any, relate it all.

"A. I spoke to Mr. Preston about this matter, and I told him that I understood that Mr. York had a brother in the police department in Oakland.

"MR. WOODWORTH: Of course that is not proper.

"MR. PRESTON: Q. Confine yourself to what transpired between yourself and Mr. York's brother? A. Well, I went to see Mr. York, I think it was the 4th of September, and I told him about the Stockton incident, and that I believed that his brother knew more about these coins than he said that he knew; I said that we were endeavoring to clear the matter up and we would

like to get at the bottom of it, and I asked him if he would communicate with his brother and ask his brother if he would not give me some information that would lead to the clearing up of this matter.

"Q. By clearing up the matter what did you mean?

"A. The circulating of these counterfeit five dollar coins, and also the Stockton incident.

"Q. You also had reference to the manufacture of these coins?

"A. I certainly did.

"Q. Now what else did you state? A. I told Mr. York that I could make him no promises, and everything I said would not be considered as a promise; if he wanted to do anything I would take him to the United States Attorney and have a talk with the United States Attorney. So he said—the man didn't even know his brother—he said 'I will write him either today or tomorrow.' That was Saturday. He said 'no later than tomorrow.' He said 'Just as soon as I get a reply from him I will let you know.' I never heard from him.

"Q. You never did hear from him? A. No.

"Q. Didn't you at that time say to Mr. York's brother, that you were sure that the defendants had not made these coins because they did not have the mechanical ability or training for that purpose—did you ever make that statement?

"A. I did not say those words.

"Q. What words did you use? A. I said, according to Mr. Foster—I was going on Mr. Foster's theory—that is, from reading his report—Mr. Foster had reported these men had been engaged in the railroad business and did not think that they were skilful enough to make these coins. That was the theory that was going on, but I believed that some other man had made the coins and that they were simply the tools of the maker and were passing it.

"Q. Did you not also say to Mr. York's brother and authorize him to state in this letter—ask him to take his brother into his confidence—did you not say that, or words to that effect? A. I told him to communicate with his brother; I did not say anything about his confidence. I presumed that he would do that anyhow."

(Transcript of Record, pp. 82-85.)

Further cross-examination was indulged in and the reply letter written by defendant York to his brother, in answer to the accusatory letter, was offered in evidence, but the Court, after reading the reply letter, refused to permit it to be admitted. (Transcript of Record, p. 88.)

The reply letter was thereafter offered several times in evidence, with the same result. The envelope and letter were marked: "Deft. Exhibit No. "I" (for Ident.)" and the original is now on file in this Appellate Court with all of the other original exhibits, it having been stipulated: "That all Exhibits introduced upon the trial of the above entitled cause and now in the custody of the Clerk of the Court shall be deemed to be included as a part of the foregoing Bill of Exceptions with the same effect in all respects as if incorporated in said Bill of Exceptions." (Transcript of Record, p. 356.)

For the convenience of this Court, we have inserted a copy of the reply letter in the Appendix to this Opening Brief.

Furthermore, Chief Secret Service Agent Moffitt was, like the preceding witness Secret Service Agent Foster, permitted to give his version or recollection of

what defendant York told him he had stated in the reply letter, as follows:

> *"A. I think he said that his brother wrote or at least Mr. York wrote his brother that he had nothing to say regarding—*
> *"Q. —that he had nothing to say?*
> *"A. —regarding the counterfeiting. That is my recollection of it."* (Transcript of Record, p. 89.)

This witness makes the further astonishing statements:

> "Q. Didn't you talk about the motive he had —the reason? A. I didn't want to know anything about his motive.
> "Q. You did not. All you desired to know was if he had passed it? A. Sure.
> "Q. And the motive with which a man passes coin makes no difference to you? A. I don't know anything about the motive.
> "Q. Don't you know it is the principal thing in this case, the motive? A. I don't know anything about it." (Transcript of Record, p. 91.)

Therefore, when the case for the prosecution had closed, the record shows the prosecution had produced the conversations which contained references to the accusatory letter and to the reply letter from the defendant York; that they were permitted to show that a letter of accusation had been sent by the defendant York's brother to the defendant York at the instance of Secret Service Agent Moffitt; that the defendant York had received the accusatory letter; that said letter had been destroyed by him shortly after receiving it; that, during the conversation Secret Service

Agent Foster had with York upon the latter's arrest, one of the first and important questions asked of defendant York was as to what he had done with the letter written by his brother to him.

Furthermore, both Secret Service Agents Moffitt and Foster were permitted to give their recollections —their versions—of what defendant York had told them he had written in the letter to his brother, *which way anything but favorable to the defendant,* Secret Service Agent Foster testifying, as to his version, as follows:

> *"Mr. York said he had nothing to say regarding the counterfeiting matter, other than what the secret service already knew."* (Transcript of Record, p. 62.)

Secret Service Agent Moffitt's version was substantially the same. (Transcript of Record, p. 89.)

Under the well settled doctrine, constituting an exception to the general rule, that statements and declarations of the accused in his own favor are inadmissible, which exception is, that when the self-serving statements are made evidence by the prosecution in producing the conversations in which they are contained, then the defendant is entitled to the admission of such self-serving statements, the defendant York, in his defense, as well as his co-defendant Karr, should have been permitted to introduce the response which defendant York made to his brother in answer to the letter written him by his brother at the instigation of Chief Secret Service Agent Moffitt. One portion of the conversation relating to the letter having gone in,

the defendants were entitled to the whole conversation relating to both letters—both the accusatory letter and the exculpatory letter.

Especially so, when the court, *sua sponte* and of its own volition, when the defendant's brother, O. S. York, was examined as a witness on behalf of the defendants, allowed him to testify as to the contents of the letter of accusation:

> "THE COURT (Intg.): I was about to state that you could show by him what the letter was. That is the only material matter, the letter itself apparently having been destroyed." (Transcript of Record, p. 235.)

Thereupon the witness O. S. York was permitted to state the contents of the letter of accusation. But when the defendants offered to introduce the reply—the exculpatory letter—offered to show that the defendant York had immediately acted upon said letter of accusation and answered it, offered to show that the letter which he wrote was not as testified to by the witnesses Foster and Moffitt, offered to show that the contents of the letter itself would negative any idea or impression that the defendant York had any sinister design in destroying the letter sent to him (the fact of destruction having been brought out by the prosecution on direct examination of its witnesses and during its case in chief), the Court denied him that right, stating:

> "My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving."

During the examination of the defendant Karr another attempt was made to introduce the reply letter written by defendant York, and the following proceedings took place:

"Mr. Moffitt asked me if Mr. York ever received the letter. I think it was on the second meeting that he asked me. At the end of this conversation he put me in the jail and the next day he came again to talk to me. That would be the 8th of October, I think. I was arrested then. I told him that Mr. York had received that letter, and he wanted to know if this R. A. York answered it, and I said he had. He said where from, and I said from London, Ontario. He said he certainly did not. Mr. Moffitt said he said he did not. I saw the letter Mr. O. S. York wrote to his brother, concerning Mr. Moffitt's proposition. I saw the answer that Mr. York wrote in London, because he handed it over to me and I read it, the same letter.

"MR. WOODWORTH: Now, if your Honor please, I do not desire to—

"THE COURT: It is hardly worth while, but you may make the offer again.

"MR. WOODWORTH: I wish to call your Honor's attention to an authority, if you would care to hear it; if not, I will let the matter go.

"THE COURT: It is the same letter?

"MR. WOODWORTH: It is the same letter; and while the general rule is as your Honor said, after working until twelve o'clock last night I discovered an exception, and the exception applies to this case.

"THE COURT: What is this exception?

"MR. WOODWORTH: The exception is, when a letter is addressed by a third party to one of the parties in interest, as it was in this case, calling for an answer, and that that answer is given, that

then it is competent as an exception to this general rule to admit that letter. We make the offer.

"THE COURT: The offer is denied.

"MR. WOODWORTH: Exception.

"(Witness continuing): I saw the letter that was sent, anyway. Do you want the conversation with Mr. Moffitt—do you want me to go right ahead with it? *This is the one about the letter. This is the second conversation. Mr. Moffitt insinuated to me that Mr. York did not write any such letter, and I told him that he certainly did write the letter, because I saw it. He said, 'There was no letter received at my office before I left.' 'Well,' I said, 'then the letter is in your place, unless O. S. York has it, because,' I said, 'That fellow is a truthful, honest fellow, and if he told you he would, he would have done it.' He said he did not receive it, and he insinuated—He told me that we were running away, or tried to get away after we got that letter, and I told him that we had laid off, that he could go and check it up by the railroad company, before this letter had ever come, and he could go to the post office and find out when that letter arrived in Columbus, to see if it was not the fact that we had laid off before we know anything about this letter."* (Transcript of Record, pp. 163-165.)

Therefore, we find that not only are the Secret Service Agents permitted, on their direct examinations and during the presentation of the case in chief on behalf of the prosecution, to testify to the existence of the accusatory letter—to conversations involving that letter—and to its destruction by the defendant York, evidently to impress the jury that this act of destruction was a circumstance indicative of a guilty conscience, and not only are the Secret Service Agents

permitted to give their own versions of what the defendant York had told them he had written to his brother in answering the accusatory letter, *which was anything but favorable to the defendants,* but we find that the Secret Service Agents threw out the insinuation that the defendants, on the receipt of the accusatory letter, planned to run away and become fugitives from justice.

Yet, in the face of all this, the Court declined to admit the answer of defendant York to the accusatory letter, which would have dispelled any impression permitted to creep into the minds of the jury that the defendant York, when accused of the offense by his brother, did not promptly and vigorously deny his guilt and protest his innocence and conclusively show, by the contents of the letter itself, that he had no guilty or sinister purpose in destroying the letter from his brother and certainly no intention to run away and become a fugitive from justice.

The insinuation was constantly thrown out by the prosecution during the trial of the case, that, when the defendants left Oakland, California, to go to other States in search of employment, they were in effect endeavoring to run away and that their search for employment was but a mere ruse on their part. If only to repel that unjust insinuation, the reply of defendant York to the accusatory letter should have been admitted.

(See cross-examination of defendant York, Transcript of Record, pp. 269-271.)

When the defendant York testified, the following proceedings took place:

> "I received a letter from my brother with reference to this matter. I answered that letter.
>
> "MR. WOODWORTH: I make the same offer now and take an exception.
>
> "THE COURT: The objection will be sustained.
>
> "MR. WOODWORTH: Exception.
>
> "(Witness continuing): Then after that I was brought here, after three weeks in Salt Lake.
>
> "THE COURT: You are speaking of the letter that he sent to his brother, not the one he received?
>
> "MR. WOODWORTH: Q. The one you received has been destroyed, has it not? A. I destroyed that.
>
> "MR. WOODWORTH: I have reference to a letter that he returned in reply to the letter which he received from his brother." (Transcript of Record, pp. 268-269.)

The general rule on the subject of self-serving declarations is well stated in 12 Cyc. pp. 426-434, as follows:

> "The statements and declarations of the accused in his own favor, unless they are a part of the *res gestae*, or *unless they are made evidence by the prosecution in producing the conversation in which they are contained,* are not competent in his favor on the trial."
>
> *People* v. *Rodley,* 131 Cal. 240;
> *People* v. *Prather,* 120 Cal. 660;
> *U. S.* v. *Craig,* 26 Fed. Cas. 14883;
> *U. S.* v. *Imsand,* 26 Fed. Cas. 15439;
> *U. S.* v. *Milburn,* 26 Fed. Cas. 15764.
>
> "When statements concerning admissions are received against defendant, *he may prove self-serv-*

ing statements in connection therewith, by reason of the rule admitting the whole conversation."

12 Cyc. p. 434;
People v. *Estrado,* 49 Cal. 171;
People v. *Farrell,* 31 Cal. 576.

"Letters Addressed to Accused: Letters written by the person injured or by third persons, addressed to the accused and received by him, *but never answered or acted on by him,* are not admissible against him unless they are part of the *res gestae.* Nor is his failure to answer them an admission of the truth of the statements contained in them. In this respect they differ from oral accusations, because otherwise the accused would be at the mercy of any letter writer whose name or address he did not know."

12 Cyc. 434;
People v. *Colburn,* 105 Cal. 648, 38 Pac. 1105;
People v. *Fitzgerald,* 156 N. Y. 253, 50 N. E. 846;
Willett v. *People,* 27 Hun. (N. Y.) 469;
People v. *Luke,* 9 N. Y. St. 638;
People v. *Green,* 1 Park, Cr. (N. Y.) 11;
Packer v. *United States,* 106 Fed. 906, 46 C. C. A. 35.

If defendant has acted upon the information contained in the letter, or if he has answered it, so much of the letter as prompted his action or received his answer is competent.

People v. *Colburn,* 105 Cal. 648, 38 Pac. 1105;
State v. *Stair,* 87 Mo. 268, 56 Am. Rep. 449;
12 Cyc. 434.

In *People* v. *Colburn,* 105 Cal. 648, *651*, it was well said:

"The possession of unanswered letters is not such evidence of acquiescence in their contents as

to make them admissible in a civil case, and a letter found upon a prisoner when arrested has been held to be no evidence of the facts stated in it. (Rapalje on Criminal Law, sec. 283; Wharton on Criminal Evidence, sec. 682; *People* v. *Green,* 1 Park, Cr. Rep. 11; *Commonwealth* v. *Edgerly,* 10 Allen, 184; *Smiths* v. *Shoemaker,* 17 Wall. 630.)

"There are exceptions to the rule, as, for instance, where it is shown that the defendant has acted upon the information contained in the letter or where he has answered it, in which case so much of the letter as is explanatory of his answer is admissible, or where the party receiving the letter has by his acts or conduct invited the sending of it to him."

In *Crawford* v. *United States,* 212 U. S. 183, 53 L. Ed. 465, it was held by the Supreme Court of the United States (quoting from the syllabus):

"A letter written by counsel for the accused, with the latter's consent, and by his direction, in reply to a letter charging him with having abstracted certain correspondence from the files of a corporation, should be admitted in evidence in a criminal case to explain the letter of accusation, already admitted in evidence without objection, for the purpose of showing a suppression or spoliation of evidence."

In that case, it appeared that the prosecution had been permitted to introduce a letter written by a witness for the prosecution (one Aspinwall) to defendant as relevant as tending to prove that the defendant was charged by that witness with abstracting the letter from the files. The answer written by the defendant to this accusatory letter was offered by him "when the

case was with him * * * which, on objection, was ruled out." (212 U. S. 183, *199*, 53 L. Ed. 465, *472*.)

The Supreme Court said:

> "It is plain that the letter from the witness Aspinwall to the defendant, making the charge that defendant took the letters, as above stated, was put in evidence by the government for the purpose of endeavoring to show that the defendant had surreptitiously taken evidence which might possibly be used against him upon his trial. *The response of defendant to such letter should have been admitted as explanatory of the letter of accusation. Without the letter of explanation the other letter should not have been received.* * * * *If the letter were admitted, then the answer to it should also have been admitted.* The court seemed to agree that if the answer had been made by the defendant personally, instead of by his counsel, it might have been admissible, but that, as defendant did not himself write the answer, it could not be admitted. The court stated, when the offer was first made by defendant's counsel to put the answer to the letter in evidence, that it was not proper to offer any of his evidence at that time, while the case was with the government, but the answer was subsequently offered in evidence by defendant's counsel, when the case was with him, and, under objection, was again rejected. *So the defendant had the accusing letter put in evidence against him and was not permitted to have his answer, through his counsel, admitted in reply.* * * *
>
> "When the letter was first offered and received in evidence on the part of the government the defendant had not been placed on the witness stand, and after he had been on the stand this evidence was retained, while the defendant *was not permitted to show what his written answer to*

the charge of spoliation was, because the answer was written by his counsel (although by his direction and under his authority), and not by himself personally. An explanation of the reason for his taking the letters might be quite material to enable the jury to come to a decision as to the *moral make-up of defendant,* but he was not allowed to fully give it. The court of appeals also held that the answer to that letter, concededly written by defendant's counsel, was plainly inadmissible, but that, even if its exclusion had been error, it was cured by the fact that the defendant, when on the stand, testified *to the same explanation of his action, i. e.,* that he understood that Aspinwall had consented that he take such of the files as he desired.

"We do not think that the letter written by counsel for the defendant was inadmissible. The defendant had in substance testified that it was written by his counsel, with his consent and by his direction. In other words, that counsel was acting simply as the agent and under the direction of his principal, the defendant in the case. It was not necessary that such letter should be written by the defendant personally, in his own handwriting. *The importance of the matter lies in the fact that defendant, as soon as the accusation was made, had, through his counsel, acting under his direction, explained the charge made of secretly taking evidence which was in the hands of a third party, and which he feared might be used against him. The defendant did on the trial testify to the same explanation as contained in the letter of his counsel, i. e., that Aspinwall in substance consented to the taking of the letters, but it is doubtful if such evidence cured the error of excluding the letter, written at once after the accusation was made and long before the trial, in which letter he admitted and explained the taking, showing it was from no desire to suppress evidence, but, on the contrary, to preserve it* * * *

> *"There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment.* (Citing *Deery* v. *Cray,* 5 Wall. 795, 807, 18 L. Ed. 653, 657; *Smith* v. *Shoemaker,* 17 Wall. 630, 21 L. Ed. 717.)"

We submit that the rule, laid down by the Supreme Court of the United States in the case of *Crawford* v. *U. S., supra,* is controlling of the situation in the case at bar.

The trial court permitted the Secret Service Agents, during the presentation of the case of the prosecution in chief, and on direct examination, to prove a portion of a conversation relating to the letter of accusation written to defendant York by his brother at the instigation of Secret Service Agent Moffitt; it permitted them to testify that this letter had been destroyed; it permitted the testimony on the part of Secret Service Agents Moffitt and Foster as to the answer that defendant York had made in his written reply to his brother, which was anything but favorable to the innocence of the defendant; afterwards, when the case was with the defendants, the trial court, of its own volition, permitted defendant York's brother to testify as to the contents of the letter he had written to defendant York; and yet, having permitted all these matters to go before the jury, refused to admit in evidence the reply of defendant York to the accusatory

letter written at the instigation of the Secret Service Agent. In this, we respectfully submit, with the greatest deference to the learning and ability of the trial Judge, that he was in error.

As was well said in the case of *Crawford* v. *United States, supra*:

> *"The response of defendant to such letter should have been admitted as explanatory of the letter of accusation. Without the letter of explanation the other letter should not have been received."*

Furthermore, contents of the accusatory letter having been admitted and it having been shown that it was written at the instigation of the Secret Service Agent, and also that the accusatory letter had been destroyed by the defendant, it was highly important that his reply should be shown to the jury so that they could see for themselves that the destruction of the letter was innocent on his part and was not done with the idea of concealing anything. For all that we know, the prosecution having proved the destruction of the accusatory letter, the jury may have thought that the defendant York destroyed it from a consciousness of guilt, whereas his reply made immediately and without hesitation would have shown his absolute denials and protestations of innocence and that he had no criminal motive in destroying the accusatory letter; also, to offset any impression created in the minds of the jury that, after receipt of the letter, the defendants sought to run away.

Again, as held in the case of *Crawford* v. *U. S.*,

supra, his explanations in his reply letter, *"might be quite material to enable the jury to come to a decision as to the moral makeup of defendant, but he was not allowed to fully give it."*

Another authority, directly in point, is the case of *Sager* v. *The State,* 11 Tex. Cr. App. Rep. 110, *112-113,* where the Court of Appeals of the State of Texas said:

> "The State, on the examination of Woolsey, her own witness and the alleged owner of the stolen articles, had drawn out *part of a conversation* between witness and defendant in which witness *stated he had charged defendant with the theft.* On cross-examination with regard to this conversation, defendant asked him to state *what was the defendant's reply to the accusation of theft.* On objection by the State the court refused to permit the evidence, for the reasons that the statements so made by defendant were *not only self-serving declarations,* but, having been made long after the offense was committed, defendant could not avail himself of them as evidence in his behalf. Self-serving declarations, it is true, that is, declarations made by a defendant in his own favor, unless part of the *res gestae* or of a confession offered by the prosecution, are inadmissible as evidence for him. Whart. Crim. Ev. (8th ed.), Sec. 690; *Harmon* v. *State,* 3 Texas Ct. App. 51. But the admissibility of the evidence here proposed did not rest upon that ground. Had the defendant proposed in the first instance to introduce these declarations, the objection might have been urged with great propriety, and would doubtless have been tenable. *But here he was examining the State's witness on cross-examination with regard to his part in a conversation about which the State had examined partly her own witness. Such being the case, and the State having opened the*

> *door for its introduction by proving part of the conversation, defendant had the right to give in evidence the whole conversation upon the subject (Code Crim. Proc., Art. 751), and the court erred in refusing to permit him to do so."*

In the case of *State* v. *Patterson,* 63 N. C. 520, *521,* the rule applicable to a situation, such as exists in the case at bar, was thus stated by the Supreme Court of North Carolina:

> "The general rule is, that a person's own declarations are not admissible for him, except under a few peculiar circumstances. But it would be unfair to receive what others said to the accused, and refuse to hear what he said in reply. This opinion is not based upon the idea that the declarations of the defendant were a part of the *res gestae,* as was contended for upon the trial below, but it rests upon the familiar principle, that when a party calls for a statement made at a given time and place, the opposite party is entitled to all that was said in the same conversation. This rule applies both to civil and criminal cases."

In *State* v. *Mahon,* 32 Vt. 241, *244,* the rule is thus stated:

> "The defendant had the right to have all that he said upon that subject at that time received and weighed by the jury as evidence, *that which made the connection to be innocent and honest, as well as that which admitted any connection. * * * It is a rule laid down by all writers on the law of evidence, and is one of the best settled and most familiar rules of evidence."*

In the case of *Mattox* v. *United States,* 146 U. S. 140, *153,* 36 L. Ed. 917, *922,* it was held that where

one part of a dying conversation had been permitted, the entire conversation, *even though self-serving in behalf of the defendant,* should be admitted. The Supreme Court said:

> "He was then interrogated as to who did the shooting, and he replied that he did not know. *All this was admitted without objection.* Defendant's counsel then endeavored to elicit from the witness whether, in addition to saying that he did not know the party who shot him, Mullen stated that he knew Clyde Mattox, and that it was not Clyde (the defendant) who did so. The question propounded was objected to on the sole ground of incompetency, and the objection sustained. In this, *as the case stood,* there was error. *So long as the evidence was in the case as to what Mullen said, defendant was entitled to refresh the memory of the witness in a proper manner and bring out, if he could, what more, if anything, he said in that connection. * * * We regard the error thus committed as justifying the awarding of a new trial."*

In *Shackelford* v. *The State,* 43 Tex. 138, *141,* it was aptly said:

> "It is often difficult to determine as to the admissibility or exclusion of the statements or explanations offered by an accused person. *It is safer, if there be a question of doubt or uncertainty, to solve the doubt by ruling in favor of the accused."*

The same rule obtains in the Federal courts, where, the Circuit Court of Appeals, for the Second Circuit, in *Parker* v. *U. S.,* 106 Fed. 906, 46 L. R. A. 35, in ruling that a letter addressed to a defendant, *and not*

answered by him, should not have been admitted in evidence, stated the exception as follows:

> "It could not be applicable to any case where the letter only tends to support a charge of guilt, and *where it has been followed by no action, and no response on the part of the person receiving the letter.* The same principle has been repeatedly applied in civil actions. *Fairlie* v. *Denton,* 3 Car. & P. 103; *Gaskill* v. *Skene,* 14 Q. B. 664; *Learned* v. *Tillotson,* 97 N. Y. 1; *Bank* v. *Delafield,* 126 N. Y. 418, 27 N. E. 797; *Gray* v. *Ice Cream Co.,* 162 N. Y. 397, 56 N. E. 903, 49 L. R. A. 580."

In *People* v. *Amaya,* 134 Cal. 331, *536*, it was said of an oral accusation against the defendant:

> "It is no doubt true, that, to render evidence of this character admissible, the occasion and the circumstances must have been such as to afford the accused person *an opportunity to act or speak, and the statement must have been one naturally calling for some action or reply.* (Greenleaf on Evidence, par. 197.) *But in this state it has been uniformly held that an accusation of crime does call for a reply, even from a person under arrest.* (*People* v. *McCrea,* 32 Cal. 98; *People* v. *Estrado,* 49 Cal. 171; *People* v. *Ah Yute,* 53 Cal. 613.)"

In *People* v. *Ah Yute,* 53 Cal. 613, *614*, it was held that statements made to the prisoner in respect to his connection with the alleged offense are admissible, to show his conduct when the statements were made, but not as evidence of the truth of the statements, and the Supreme Court of this State said:

> "This question was fully considered in *People* v. *McCrea,* 32 Cal. 98. The testimony objected

to in that case was of the same character as that stated above, and it was held that it was admissible —that such statements were admissible, 'not as of themselves evidence of the truth of the facts stated, *but simply to show what it is that calls for a reply, and the action of the defendant himself under the circumstances, as indicating an acquiescence in, or repudiation of, the truth of the statement.' That is, in our opinion, the proper solution of the question.*" (See, also, *People* v. *Estrado,* 49 Cal. 172.)

In *People* v. *McCrea,* 32 Cal. 98, *100,* Justice Sawyer, afterwards United States Circuit Judge, in holding that statements of accusations, whether oral or written, acted upon by the defendant, should be admitted, both the accusation and the reply or conduct of the defendant, said:

"The rule recognized by these authorities is clearly broad enough to cover the testimony in question. But these statements are admitted, not as of themselves evidence of the truth of the facts stated, *but simply to show what it is that calls for a reply, and the action of the defendant himself under the circumstances, as indicating an acquiescence in, or repudiation of, the truth of the statement. His own action under the circumstances in which he is placed, is the matter to be considered and weighed by the jury.* The degree of credit due to such evidence of implied admissions is to be estimated by the jury under the circumstances of each case. But jurors should be cautioned not to allow their attention to be diverted from the conduct of the prisoner—the real matter to be considered—to the statements of the third party, as containing the evidence of the facts sought to be established. To do so, would be to receive and give effect to statements which, except for the purpose of showing the circumstance under which the prisoner is called upon to act or

> speak, would be wholly inadmissible. *The prisoner, at best, is taken at a disadvantage, and is bound to reply or not reply, at his peril, to the inquiries or statements of any officious intermeddler who may be able to obtain access to him. There was no error in admitting this testimony; but the jury are to judge all the circumstances, entitled to any, and how much weight, as indicative of an admission of guilt."*

In the case of *People* v. *Ah Yute,* 54 Cal. 89, *90,* decided on a rehearing, it was held that statements of third persons, made in presence of the defendant, are admissible against him only to the extent they are admitted by him to be correct, either by his words or conduct; and the conduct of the defendant is the gist of the inquiry, and the only matter to be considered by the jury. Such statements are, therefore, inadmissible unless accompanied with proof of defendant's statements or conduct in response thereto. Justice Ross, now a member of the Circuit Court of Appeals for this circuit, said:

> "In all of those cases the prosecution was allowed to prove statements of third parties made in the presence of the defendant, *together with defendant's statements and conduct in response thereto.* The conduct of the defendant is the gist of the inquiry, and is the only matter to be considered and weighed by the jury. The statements of third persons are admitted only as preliminary to the inquiry, and for the purpose of showing his conduct. Thus, in *People* v. *Estrado, supra,* it is said: 'The statement of Cotta was not offered to prove of itself the circumstances narrated by him. It was evidence against the defendant *only to the extent it was admitted by the defendant to be correct,* his acquiescence being

indicated by his express assent, by his silence, or by acts or by conduct on his part which could be fairly construed as an assent.' (See, also, Roscoe's Criminal Ev., p. 52; 1 Greenleaf's Ev., Secs. 197, 215; Joy on Confession, 77.)

"In the case at bar, the prosecution, as we have seen, was permitted to introduce statements of third persons, made in defendant's presence, to the effect that he was the guilty party, and there to stop—*without any proof whatever of the only matter that could properly be considered by the jury, namely, the conduct of defendant when so accused.* Such testimony was purely hearsay, and should have been stricken out on defendant's motion."

In the case of *People* v. *Estrado,* 49 Cal. 171, *173,* Justice McKinstry, in holding that the statement of a third party in the defendant's presence, as well as defendant's statements and conduct at the time were admissible. The learned Justice said:

"Immediately after the close of the narration by Cotta, a statement was made by Estrado, which, while denying many of the details of the accounts given by the former, agreed with that account as to some of the facts. *It was not error to permit both statements to go to the jury, that by comparison of the one with the other it might be ascertained how far the allegations of Cotta were admitted by Estrado to be true.* The statement of Cotta, however, so far as it was contradicted by, or was irreconcilable with that of Estrado's statement in respect to the actual conflict was correct, he was innocent of any crime. It cannot be assumed that the statement of Cotta, where denied by the defendant, had any appreciable weight with the jury."

The same rule obtains in civil cases.

In *Smith* v. *Shoemaker,* 17 Wall. 630, 21 L. Ed. 717, the Supreme Court of the United States, through Mr. Justice Miller, said:

> "The admission of the letter was objected to and an exception taken on the ground, among others, that plaintiff could not introduce his own declaration or that of those under whom he claimed, to show that the ancestor of defendants had entered under the person making the declaration. Other and more specific grounds of objection were taken, but it is not necessary to mention them here, for it is certainly a sound principle of evidence, that such a declaration as this, whether oral or in writing, is inadmissible, unless some exception to the general rule be shown."
>
> "Another objection is, that there is nothing in the record to show that the letter was delivered to Hamilton J. Smith, or was ever in his possession or acted upon by him. It is not shown how the plaintiff came into possession of it, or from what source it was produced by his counsel at the time of the trial. It would violate nothing found in the record to suppose that the letter was written and delivered to the plaintiff by its supposed author on the same day it was read in evidence. When a party seeks to justify in a court of review the admission of such *ex parte* declarations of himself or his vendor, against the objection of the other side, he must show by the record some circumstance which would obviate the manifest soundness of the objection."

Entire conversation is competent, *though self-serving declarations are included therein,* where one party introduces evidence as to such conversation. *Olson* v. *Brundage,* 139 Ill. App. 559.

Letter written by party, in his favor, is admissible in evidence if necessary or helpful in explaining an-

swer introduced by other party. *Schwarschild & Sulzberger Co.* v. *Pfaelzer,* 133 Ill. App. 346.

In the case of *Carber* v. *United States,* 164 U. S. 694, 41 L. Ed. 602, it was held that where a conversation is permitted to be proved, the other party may prove his version of it. Mr. Justice Brown said:

> "If it were competent for one party to prove this conversation, *it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government's version, and it may be that defendant was not prejudiced by the conversation as actually proved, but where the whole or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary or contradict it.*"

Where one part of a conversation is put in evidence, the other party is entitled to all the conversation.

1 Bishop Crim. Practice, Sec. 1241.

In Underhill's Criminal Evidence, Sec. 119a, an exception to hearsay rule as to self-serving declarations is made where prosecution offers in evidence declarations which tend to incriminate accused, then defendant may introduce whole conversation *even though it be wholly in his favor.*

Rogers v. *State,* 26 Tex. App. 404;
Fertig v. *State,* 75 N. W. 960;
Lowry v. *State,* 53 Tex. Crim. App. 562.

In the case of *Stephenson* v. *United States,* 86 Fed. 106, *108, 110-111,* it appeared that:

"In connection with this evidence the plaintiff

in error offered the evidence of one Alexander Smith as to the conversation between the witness and himself at the time just preceding the said Schriverer's approach to the party, to the effect that the witness Smith had opened a conversation with the plaintiff in error, saying to him, 'John, you have killed the man,' and plaintiff in error replied 'Who is it?' and the witness said 'Joe Gaines,' whereupon the plaintiff in error replied, 'I wish I had been that other son-of-a-bitch, Bluff Davidson;' immediately upon which the government's witness, Schrivener, came up, and continued the conversation as testified to by him. To the introduction of this evidence by Alexander Smith objection was made, and the Court excluded the same upon the ground that it was self-serving, and not a part of the *res gestae,* nor in explanation of the other declarations in evidence. To this ruling of the court exceptions were duly taken."

The Circuit Court of Appeals held this to be error and said:

"The conversations and declarations of the accused after his arrest formed no part of the *res gestae,* and in his behalf were inadmissible, but they were admissible against him if the prosecution saw fit to avail itself of them, and when the United States proved the conversations and declarations *the accused was entitled to have the full conversation or conversations given in evidence. This we understand to be elementary.* The case clearly shows that what Scrivener heard defendant say after the homicide was intimately and directly connected with the conversation between the accused and witness Smith, and, as the part Scrivener heard was offered in evidence, *the whole, on the request of the accused, should have been admitted. Where one part of a conversation is introduced, the other party is entitled to all*

that relates to the same subject, and all that may be necessary to fully understand the portion given.

1 Bish. Cr. Proc., Sec. 1241; *Carver* v. *U. S.*, 164 U. S. 694, 696, 17 Sup. Ct. 640."

The question, which led to the particular letter which the Court refused to admit in evidence, was asked by the prosecution during the examination of their own witnesses, Foster and Moffitt, in presenting their case in chief.

The cross-examination of the witness Foster, a witness called on behalf of the Government, referred to this letter and the witness Foster was permitted, without the slightest objection from the United States attorney, to state the contents of that letter, it then appearing that the Government officers had possession and custody of the letter. He was permitted to say as follows:

"Q. Did Mr. York tell you what answer he had made to the letter of his brother? A. I think, if my recollection serves me correctly, Mr. York said that he had nothing to say regarding the counterfeiting matter, other than what the secret service already knew.

"Q. And that is the only answer he made to you? A. That is my recollection of it. That is the purport of it, anyhow.

"Q. That was with reference to the contents of that letter? A. Yes.

"Q. Of the letter which he wrote to his brother in answer to the one sent by his brother? A. Yes."

Secret Service Agent Moffitt was permitted to swear that he had seen the letter, that it was handed to him

by his assistant, Costanzo, and that it was taken on a search warrant from the defendant York brother's custody and that he then had possession of that letter and would only produce it if required by the District Attorney. The letter was then produced. The Court read the letter and refused to admit it.

Thereafter O. S. York, the defendant's brother, was permitted, at the Court's special instance, to state the contents of the letter of accusation which had been written to the defendant York.

The reply of the defendant should have been admitted for the reason that the Court permitted testimony showing that a letter of accusation had been sent to the defendant York, the Court permitted the contents of the letter of accusation to be testified to, the Court permitted evidence that the defendant York had actually received the letter and had destroyed it, and that he had replied to it.

The Court having permitted one portion of the conversation to go in, the defendant was entitled to the whole of the conversation.

Secondly, the Court having permitted evidence to show that a letter of accusation had been sent at the instance of the Government officers, the defendant was entitled to show that he acted upon the same and that he replied to the same and that he repudiated the accusation and protested his innocence.

Thirdly, the Government having been permitted to show statements concerning admissions against a defendant, he may prove self-serving statements in

connection therewith, by reason of the rule admitting the whole conversation. The testimony of Foster and Moffitt as to what the reply of York contained *was anything but favorable to the defendant and made it appear that he had nothing to say, that he did not deny, that he acquiesced in what the secret service men already knew.* As testified to by Foster it was tantamount to an admission of guilt. The defendant was, therefore, entitled to prove his self-serving declarations.

Fourthly, the letter itself was admissible to contradict the testimony of Foster and Moffitt as to the contents of the letter and for the purpose of dispelling any idea that York had nothing to say regarding the counterfeit matter, other than what the secret service already knew, or that he ever intended to run away.

To leave the case before the jury without the reply of the defendant York before them was highly prejudicial to the defendants; to leave the case before the jury after proof of the letter of accusation at the instance of the Government officers, after proof of the contents of the letter of accusation, after proof of its receipt by the defendant York, simply with the version of the contents of the reply as given by the witnesses Foster and Moffitt wherein they state that the purport of the answer made by defendant York to the letter of accusation was: *"Mr. York said that he had nothing to say regarding the counterfeiting matter, other than what the secret service already knew,"* was to leave the case in a most prejudicial condition before the jury and leave the defendants at the mercy of such

impression as the jury might see fit to give to the version of the letter given by the witnesses Foster and Moffitt.

Furthermore, this substantial error was aggravated by the Court when it, in sustaining the objection made by the prosecution to the introduction of this letter said: *"My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving."* In other words, the jury must have construed the language of the Court as meaning that unless the defendant York took the stand he was a guilty man. This was fundamental error, as the silence of the defendant cannot prejudice him. He is not required to be a witness and any such remark of the Court was uncalled for and constitutes substantial error. The courts and prosecuting officers are not permitted, by virtue of a special statute, to make the slightest reference to the fact that a defendant may or may not, or should or should not, become a witness in his own behalf.

We respectfully submit that further argument, on errors so palpable and prejudicial to defendants on trial for their liberty, is unnecessary.

III.

The trial Court erred in permitting the jurors to experiment with an article not in evidence.

This is covered by the following assignments of error:

(XL): "The Court erred in permitting a 'square block of iron' to be shown, handled by and experimented by the jurors, over the objections of the attorneys for the defendants that said 'square block of iron' had not been introduced in evidence."

(XLI): "The attorneys for the Government erred in presenting and showing to the jurors and in handing to them and in permitting the jurors to experiment with a 'square block of iron,' when said 'square block of iron' had not been introduced in evidence."

(XLII): "The Court erred in overruling the objection of the attorneys for the defendants to the question propounded on cross-examination of the witness Frank T. Green, called on behalf of the defendants, which question was as follows: 'MR. PRESTON: Q. I will show it ('square block of iron') to you and ask you what it is?'"

(XLIII): "The jurors, or some of them, erred to the substantial prejudice of the defendants in being permitted by the Court and the attorneys for the Government to see and to be shown and to handle and to experiment with a 'square block of iron', which had not been introduced in evidence, over the protests and objections of the attorneys for the defendants."

(XLIV): "The Court erred in overruling the objections of the attorneys for the defendants that any questions be asked of the witness Frank T. Green concerning or with reference to a 'square block of iron', which was not admitted in evi-

dence, or in permitting, over the objections of the attorneys for the defendants, any of the jurors to see or be shown or to handle or to experiment with said 'square block of iron.'"

(XLV): "The Court erred in permitting any experiments whatever by any of the jurors with a 'square block of iron', and a five dollar gold piece and a five cent nickel piece, when said 'square block of iron' had not been admitted in evidence, all to the substantial prejudice of the defendants." (Transcript of Record, pp. 408-410.)

The record discloses the following situation with respect to this grave and highly prejudicial error:

The prosecution, during its case in chief, had been permitted to show, through Secret Service Agent Isidore Costanzo, that a certain "square block of iron," *never introduced in evidence,* was found in the basement of the house where defendant Karr had formerly resided with his wife and child. This "square block of iron" was not discovered in the basement until some time toward the end of September, 1915, long after the Karr family had moved away and long after the consummation and end of the alleged conspiracy—on July 9, 1915. Furthermore, the evidence indisputably shows that the Karr family had moved from this house during the month of July, 1915; that it was vacant for two months; that the basement was always open and accessible to anybody and everybody who chose to go in; that it was never locked; that after the Karr family had vacated the premises and it had been vacant for a couple of months, certain itinerant foreigners, probably Italians, rented the place for a month or so; that they had no visible means of

support; that a man and his wife and child who lived there for several weeks could not be found at the time of the trial and had completely vanished; that one Paul Montfort, who resided with the man and woman who disappeared, did appear and testify; that he denied that he had been secretly employed by the Secret Service Agents to rent the place; that the pretense of the Secret Service Agents, that they had discovered plaster of paris in the basement, was exploded, when counsel for defendants produced the witness Frank T. Green, an expert chemist, whose testimony showed that what the prosecution claimed to be plaster of paris, testified to be such by Secret Service Agent Costanzo (Transcript of Record, pp. 106-108), was not such and in reality was nothing more than air-slaked lime, a material which could *not* be used for moulds, to which plaster of paris alone is peculiarly adapted. (Transcript of Record, pp. 285-286.)

Previous to the examination of this witness, the Secret Service Agents had committed the grave act of misconduct of exposing to the view of the jury, in such close proximity to the jury box that they could not help but noticing it, a "square block of iron". This made such an impression upon the jurors that, during the examination of Mrs. Irene Karr, defendant Karr's wife, one of the jurors, while questioning Mrs. Karr, called for this "square block of iron." *During all this time, it must be remembered, the "square block of iron" had not been introduced in evidence.* At that particular moment, when first called for by the juror, the "square block of iron" did not happen to be in

court. It was subsequently brought into court and the following proceedings took place:

"A JUROR: Is not plaster of paris used in very many instances for making moulds for metals and things of that kind? A. I am not familiar, I will state, with the method of casting medals or coins. Q. You are familiar with casting metals? A. No.

"Another Juror: May I see that square block of iron?

"The Court: The square block of iron?

"Mr. Woodworth: No square block of iron has been introduced in evidence.

"Mr. Preston: No. A witness has to be put on the stand before that can be used as evidence, unless you want to ask him a question about it.

"The Juror: I want to ask him a question about it.

"Mr. Woodworth: Unless the block is introduced in evidence, it cannot be used.

"Mr. Preston: What is the nature of your question? State your question.

"The Juror: There is some impression on here that would look as though it were the face of a coin, and also on the opposite side. I want to ascertain the size of the coin that would fit in there; and if it were possible by placing a coin in there that you could cover it with plaster of paris and ascertain whether it could become a mould for a coin.

"THE WITNESS: That I may answer is a technical question calling for a knowledge of the casting of metals in proper moulds, and I am not competent to answer that.

"Mr. Woodworth: I desire to reserve the objection, your Honor. Mr. Preston has not yet introduced this and it has not yet been connected with the defendant, and it certainly is highly improper to permit a question of that sort to be addressed to the witness or to allow the juror to see such a thing, unless it is in evidence.

"MR. PRESTON: I cross-examined the witness Mr. Poole and asked him if he had seen this stuff.

"MR. WOODWORTH: You had never shown him that?

"MR. PRESTON: I did show him that.

"MR. WOODWORTH: What did he say about it?

"Mr. Preston: He said he had not seen it there. Before the case closes, when the defendants close their proof, we will show it was there at the place when he closed it up. At that time it would be more proper to have the matter in evidence.

"Mr. Woodworth: I understand that you have closed your case in chief, and I don't know that you have any right hereafter to introduce further evidence.

"Mr. Preston: We will see; that is for the Court.

"The Juror: The only point is, that this hole on this side is the size, I think, of a five dollar piece and the other isde is the size of a nickel. I may be wrong, and I may be correct (after experimenting). This is the size of a five dollar piece there and this appears to be the size of another coin; I don't know what.

"THE JUROR: The point I had, your Honor, was that it might possibly be used as a basis for making moulds and not as a mould itself. A. May I answer?

"MR. PRESTON: If you can. A. I made an examination for the attorney. Shall I repeat that—am I permitted?

"MR. WOODWORTH: Q. Did you examine this also? A. No, I saw that.

"MR. PRESTON: Q. I will show it to you and ask you what it is.

"Mr. Woodworth: Of course, I would like to know this—I have never heard of this before in this case.

"Mr. Preston: It was identified or described.

"Mr. Woodworth: It has never been introduced in evidence.

"Mr. Preston: We will introduce it.

"Mr. Woodworth: I object to the witness testifying to something that has not been introduced in evidence.

"Mr. Preston: It is in evidence as much as the box is. I would like to have him say what it is anyway.

"The Court: The objection will be overruled.

"Mr. Woodworth: Exception."

(Witness continuing): I think a chemist could answer what it is upon a chemical examination. No, I could not tell what it is without a chemical examination. (Transcript of Record, pp. 286-289.)

Outside of what the record shows, these experiments by the jurors with the "square block of iron" *were conceded to have taken place by the prosecution.* This was made manifest upon presentation of the motion for a new trial, when the following proceedings took place, the jurors all being present in open court:

(Mr. Woodworth, addressing the Court): "I desire to call to the witness stand and examine the jurors for the purpose of establishing the misconduct and irregularities complained of, unless the District Attorney will admit the facts. We now offer to prove by each, every and all of the jurors who tried this case that the square block of iron, which was produced in court during the trial, by the Secret Service officers and the prosecution, and which I now hold in my hand and which is 'Exhibit A' attached to the affidavits of the defendants on the motion for a new trial, was actually exhibited to and in the presence of the jury and to the jury by the Secret Service Agents Moffitt and Costanzo, although it had not then been

admitted in evidence; that this square block of iron, with what appeared to be the impression of a $5 piece on one side of the square block and of a five cents or nickel piece on the other side of the square block, was exhibited to the jury and was placed by the Secret Service Agents on the edge of the jury box upon the floor thereof, right in front of the first row of jurors, where it could be and was actually seen by all of said jurors seated in the first row and by some of the other jurors seated in the second row, and was permitted to remain under the gaze of said jurors at the southwestern corner or edge thereof nearest to the table where the prosecuting attorneys and Secret Service Agents sat during the trial, and said square block of iron was permitted there to remain under the gaze of the jury and particularly of juror A. D. Shepard for some considerable time and was permitted to be inspected and handled and experimented with by some of the jurors in attempting to and in actually fitting in $5 gold pieces into one of the cavities contained on one side of the square block of iron, which cavity appeared to contain the impression of a $5 piece and seemed to be of a size that would admit of the placing therein a $5 piece, and that after such personal inspection, handling and experimenting as above set forth and as shown by the record of the proceedings in this case, that said square block of iron was then withdrawn or taken away by said Secret Service Agents Moffitt and Costanzo without its having been admitted in evidence or offering the same in evidence at that time; that said square block of iron was again brought into court by the Secret Service Agents and again exposed to the view of the jurors and again permitted to be inspected, handled and experimented with and questions propounded with reference thereto by some of the jurors and some one of the prosecuting attorneys without its having been admitted in evidence or offering the

same in evidence at that time. Unless you are willing to admit these facts, Mr. Thomas, I will call each one of the jurors to prove what I now offer to show."

(MR THOMAS): "I do not think it will be necessary to call the jurors. *The record shows that was exhibited to the jury and we admit that the block of iron was in the court and was on the panel there for a while and that it was examined by one of the jurors. I don't admit he fitted it in. I admit that experiments were made with it.*" (See Transcript of Record, pp. 330-331.)

It is true that the Court below denied the motion for a new trial and, mindful of the rule that, in the Federal Courts, error cannot usually be predicated upon the denial of a motion for a new trial, we are not assigning any error on that ground.

That jurors are not permitted to experiment is well settled. Especially is this true with reference to objects or material not admitted in evidence.

Underhill on Crim. Ev. (2nd Ed.), Sec. 228, pp. 416, 418, and cases there collated;
People v. *Conkling,* 111 Cal. 616; 44 Pac. 314;
Forehand v. *State,* 51 Ark. 553, 11 S. W. 766;
State v. *Sanders,* 68 Mo. 202, 30 Am. 782;
Jimm v. *State,* 4 Humph. 289;
Stokes v. *State,* 5 Baxt. 619, 30 Am. Rep. 72;
Harris v. *State,* 24 Nev. 803, 40 N. W. 317;
People vs. *Stokes,* 103 Cal. 193, *198;*
Wharton's Crim. Ev., Vol. I (10th Ed.) 611 (Note);
Ewers Admr. v. *Nat. Imp. Co.,* 63 Fed 562;
Kruidener v. *Sheilds,* 70 Iowa 428, 30 N. W. 681.

"For the jury to perform experiments during their deliberations with the weapons alleged to

have been used in the commission of the crime is error."

Hansing v. *Territory,* 4 Okla. 443, 46 Pac. 509.

The general rule is thus stated in 12 Cyc. 678:

"Experiments by the jurors by which they ascertain facts material to the case, but not included in the evidence, constitutes misconduct on their part and will justify a reversal." (Citing cases.)

In Hayne New Trial and Appeal, Vol. 1, sec. 26, page 141 (Revised Edition), the rule is laid down that if the "misconduct" or irregularity *may* or *might have* prevented a fair trial, a new trial should be granted and the rule is further laid down that such "misconduct" or "irregularity" is presumed to have prevented a fair trial.

That eminent author refers to the leading case on the subject, of *Commonwealth* v. *Rodey,* 12 Pick. 496; also *Hare* v. *State,* 4 How. (Mass.) 107, and other leading cases, including California and Federal Courts.

See, also, Hayne New Trial and Appeal, Vol. 1, pages 309-317, 318, 324, and cases there collated.

In the case of *People* v. *Thornton,* 74 Cal. 482, *484,* it was held that a pamphlet admitted in evidence and "by consent considered read in evidence," but which was *not read in evidence,* could not be taken to the jury room and read by the jurors during their deliberations, and that to permit the jurors to take the pamphlet as a whole to the jury room and to read portions thereof other than were actually read to them during

the trial, constituted receiving evidence out of court and was misconduct and a new trial should be granted.

In Hayne New Trial and Appeal, Vol. 1, page 315, sec. 67, it was said:

> "The theory of jury trials is, that all the information about the case must be furnished to the jury in open court, where the judge can separate the legal from the illegal evidence, and instruct them as to the law of the case, and where the parties can counteract the effect of any particular evidence by producing such other evidence as they may have. If the jurors were permitted to investigate the case outside of the courtroom, there would be great danger of their getting a one-sided and illegal view of the case. Accordingly, the great preponderance of authority is to the effect that if such investigations have taken place a new trial must be granted, unless it is shown affirmatively that they did not affect the result. Information concerning the case may be conveyed to the jury either by oral communication or by documents relating either to the facts or to the law of the case. These modes of unlawful communication will be considered separately."
>
> "If it be *doubtful* from the record whether *injury* was done or not, the verdict *must be set aside.*"
>
> Hayne New Trial and Appeal, Vol. 1, p. 318.
>
> "Where, however, the irregularity is shown, it is *presumed* to have been injurious unless the court can see the contrary from the record."
>
> Hayne New Trial and Appeal, Vol. 1, p. 320.

In the case of *People* v. *Mahoney,* 77 Cal. 529, 530-531, it appeared that:

> "After the jury had returned to deliberate upon a verdict, they requested through the deputy sheriff that a certain coat, alleged to have been

worn by the deceased at the time of the killing, should be sent into the jury room for their inspection. The transcript certified by the judge states that the coat 'was the one which had been produced and examined in open court during the examination of the witnesses Carpenter and Lannom, and at said time exhibited to the jury. After the retirement of the jury the officer in charge of the jury informed the court that the jurors had expressed a desire to see the coat. The court informed counsel, in the presence of the defendant, that the jurors had requested that the coat be sent into the jury room for their inspection. Thereupon defendant's counsel stated that the coat *had not been formally offered in evidence.* In response to that suggestion the court said that if the coat *was not in evidence, the jurors would have to get along without the coat.* Counsel for defendant thereupon, after a moment's reflection, *consented* that the coat might be submitted to the jury.' *The consent of counsel for defendant* in the presence of the defendant, that the articles might be sent to the jury, was a *waiver of all objection,* and we see no error in the action of the court or jury."

In the case at bar, the attorney for the defendants made repeated objections to the "square block of iron" being shown to the jurors and vehemently protested and called the court's attention thereto and excepted. The experiments by the juror Shepard with the "square block of iron," in the presence of the other jurors, in open court, was a most flagrant violation of the defendant's rights to a fair and impartial trial, especially in permitting him to experiment with something "not in evidence."

Continuing the statement of the law on this subject,

Hayne, New Trial and Appeal, volume 1, page 321, section 67 (Revised Edition), states:

> "Slightly different in form, but requiring a similar application of principle, it is that kind of misconduct which originates in independent investigation. No matter at what stage of the proceedings a juror undertakes an inquiry of his own, if it appears that information of a character calculated to exert any influence upon the verdict is obtained ,a new trial will be granted, unless it is shown affirmatively that no such result followed. An illustration of the rule is to be found in the case of *People* v. *Conklin* (111 Cal. 616, 44 Pac. 314), a murder case, where members of the jury procured a rifle, presumably of a pattern identical with that used in the homicide under investigation, and carried on experiments of a somewhat exhaustive character, for the purpose of studying the effect of shots upon clothing at varying distances, and making comparison with that observed upon the garments of the deceased. A new trial was granted."
>
> "Receiving evidence out of court is specifically made a ground for new trial in criminal cases."
>
> Hayne, New Trial and Appeal, vol. 1, p. 24.

Proof that while a case was pending, and before the testimony was concluded, or the charge given, one of the jurors privately measured the distance as testified to in the case, is ground for setting aside the verdict.

Ewers, Admr., v. *Nat. Imp. Co.,* 63 Fed. 562.

In *People* v. *McCoy,* 71 Cal. 395-*397,* the Supreme Court of California said:

> "Jurors in a criminal action are sworn to render a true verdict according to the evidence.

They cannot, under the oath which they take, receive impressions from any other source. If it be proved as a fact, or may be presumed as a conclusion of law, that their verdict may have been influenced by information or impression received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial."

In *People* v. *Stokes,* 103 Cal. 193, it was held that a new trial should be granted where it appeared that after retiring to deliberate upon their verdict some of the jurors read an article in a local newspaper containing a report of the evidence in the case, *including certain evidence which the court had ruled to be inadmissible,* and it was held that it would be presumed to have influenced the jurors, and a new trial should be granted for misconduct of the jury.

The Supreme Court said:

"The misconduct charged consisted in the jury reading from a local newspaper an article containing a report of some of the evidence in the case, given at the trial, *which included a matter of evidence the court had rejected as inadmissible,* and also contained intimations that two of the jurors had been corrupted. The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, they could make no showing that would relieve them of the effects of their own misconduct. A juror is not allowed to say: 'I acknowledge to grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury-room.' The law, in its wis-

dom, does not allow a juror to purge himself in that way. It was said in *Woodward* v. *Leavitt,* 107 Mass. 466, 9 Am. Rep. 49: 'But, where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decision. A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind.' "

People v. *Mitchell,* 100 Cal. 328.

In *People* v. *Conkling,* 111 Cal. 616, *627*, it appeared that:

"When the defendant's motion for a new trial came before the court he offered the affidavits of certain parties to the effect that during the progress of the trial two of the jurors borrowed a rifle similar to that with which the deceased was killed, bought some cotton drilling, retired to the outskirts of the city, and there made experiments by firing the rifle, for the purpose of determining at what distance powder marks would be carried by the fire. The evidence upon this question disclosed by the affidavits is circumstantial, but we think amply sufficient to establish the fact that these things were done by the two jurors. Especially is this so when we pause to consider that those jurors have not denied the fact by counter-affidavits. They were evidently honest, and desirous of getting at the truth of the matter; but they were too zealous, and their misconduct in this particular demands a retrial of the case. *Jurors cannot be permitted to investigate the case out-*

side the courtroom. They must decide the guilt or the innocence of the defendant upon the evidence introduced at the trial. It is impossible for this court to say that this outside investigation did not affect the result as to the character of the verdict rendered. For, when misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears. (*People* v. *Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102.)"

In *Yates* v. *People*, 38 Ill. 527, it was said:

"In support of his motion for a new trial, the plaintiff in error filed an affidavit, in which he stated that, after the jury had retired to consider upon their verdict, and without any knowledge of himself, his counsel, or the court, a pistol was sent to them as the same pistol with which the killing had been done, *though it has not been offered in evidence and identified,* and with this pistol the jury made experiments which determined their verdict, they having been, up to this time, equally divided. The statements in this affidavit do not seem to have been controverted by the people's attorney, but we find a stipulation in the record that the pistol mentioned in the affidavit was the same pistol which had been exhibited to the jury on the trial and spoken of by the witnesses. * * *

"Because this pistol *which had not been put in evidence or identified,* was allowed to go to the jury, without the prisoner's consent, a new trial should have been granted, *and on this ground we reverse the judgment.*"

Forehand v. *State*, 51 Ark. 553, 11 S. W. 766.

"The jury's misconduct in taking the deceased's pistol and cartridges to the jury room, and there experimenting with them, apparently for the purpose of testing the truth of the defendant's statement, was prejudicial to him. It was evidence taken by the jury out of the court in the defend-

ant's absence, which is prohibited by the statute and contrary to the rules of fair and orderly proceedings. For this error the judgment must be reversed."

State v. *Saunders,* 68 Mo. 202, 30 Am. 782.

(Syll.) The counsel for the defendant in a criminal case, in the course of his argument to the jury after the close of the evidence, told them that they had a right to try for themselves whether worn out boots, like those described by the witness for the state, would make such tracks in the dust or sand as they described, and advised the jury to make the experiment. Several members of the jury actually did make the experiment out of court, without obtaining the leave of the court, and in the absence of the defendant. Held, that this was such misconduct as invalidated the verdict, and the defendant was not precluded from alleging it as ground for a new trial by the fact that it was done at the instance of his counsel. It was the duty of the court and the state's attorney to have warned the jury against making the experiment.

"Disregarding the affidavit of the juror Jessop, which was clearly inadmissible, we have still before us the fact that a portion of the jury experimented, with a view to ascertain a fact testified to at the trial, and to test the credibility of the witnesses who testified in regard to that fact. That such experiments by a portion of the jury, or by all the jury, are improper, without leave of the court, is incontrovertible. * * * The question here, however, is whether, after the jury are invited by the defendant's counsel to make certain experiments for themselves, and the jury, or a portion of them, do so, the defendant can, after the verdict is unfavorable, take advantage of this misconduct of the jury invited by himself. This looks like allowing a party to take advantage

of his own wrong, and therefore has caused some hesitation, but upon reflection, we have concluded that the court and the attorney for the state should share the responsibility of such misstatements and allowing them to go uncontradicted. The judge, who presided at a trial of a criminal, should not allow the jury to be misled as to their duties or powers. * * * If we consider the affidavit of Jessup, no presumption is necessary, but apart from that, the possibility of the experiment being so used is sufficient to establish its impropriety. Upon the whole, without special regard to the present case, we are of opinion that it would be unsafe to further relax the well-established rules governing the conduct of juries and that we must, therefore, recommend this case for another trial."

Where the question was, could the prisoner's voice have been heard on a certain occasion, the experiment of stationing a man outside the jury room who was to listen and report if he could hear the voices of the jurors through a closed door, was held ground for a new trial.

Jim v. *State,* 4 Humph. 289.
Stokes v. *State,* 5 Baxtr. 619, 30 Am. Rep. 72.

(Syll.) On a charge for murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that wherein the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused and the court instructed the jury that his refusal was not to be taken against him. The

prisoner was convicted. Held, that he was entitled to a new trial.

Harris v. *State,* 24 Neb. 803, 40 N. W. 317. (Juror improperly took law book into jury room and read from it.)

"The rule of public policy which excludes the testimony of jurors to impeach their verdict extends only to matters taking place during their retirement and it is competent to impeach the verdict as to matters occurring outside the jury room during the progress of the trial."

Rush v. *St. Paul City R. Co.,* 70 Minn. 5, 72 N. W. 733.

In some states it is said that "affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury room which does not essentially inhere in the verdict itself."

Vol. 8, Encyc. of Ev., p. 979.

See *Kruidenier* v. *Shields,* 70 Iowa, 428, 30 N. W. 681 (using evidence not legally admitted. Held cause for reversal and new trial).

For the same reason, for the jury to perform experiments, in the courtroom, in the very presence of the court and prosecuting officers, with a square block of iron never introduced in evidence, is a much more flagrant error.

In the leading case of *People* v. *Stokes,* 103 Cal.

193, 196, it was said, of the misconduct of the jury, as follows:

> "The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, *they could make no showing that could relieve them of the effects of their own misconduct. A juror is not allowed to say: 'I acknowledge the grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury room.' THE LAW, IN ITS WISDOM, DOES NOT ALLOW A JUROR TO PURGE HIMSELF IN THAT WAY.* It was said in *Woodward* v. *Leavitt,* 107 Mass. 466, 9 Am. Rep. 49: 'But, where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, *THOUGH NOT TO SHOW WHETHER IT DID OR DID NOT INFLUENCE THEIR DELIBERATIONS AND DECISION.* A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, *BUT HE CANNOT BE PPERMITTED TO TESTIFY HOW FAR THAT INFLUENCE OPERATED UPON HIS MIND.'"*

In the case of *People* v. *McCoy,* 71 Cal. 395, it was said:

> "If it be *proved as a fact,* or *may be presumed as a conclusion of law,* that the verdict MAY HAVE BEEN INFLUENCED BY INFORMATION OR IMPRESSIONS RE-

CEIVED FROM SOURCES *OUTSIDE OF THE EVIDENCE IN THE CASE,* SUCH A VERDICT IS SUBJECT TO BE SET ASIDE ON A MOTION FOR NEW TRIAL."

See, also, *Carter* v. *State,* 9 Lea (Tenn.) 440.

The attempted differentiation made, upon argument of the motion for a new trial (and which we expect to be renewed here), by the United States Attorney, of all of the authorities cited by us containing instances of misconduct by jurors in making experiments outside of the courtroom or in receiving evidence outside of the courtroom of matters or things not admitted in evidence, is absurd, puerile, illogical and unsound.

What possible difference, in principle and from the standpoint of a fair and impartial trial to a defendant, it can make in the application of the law whether a juror is guilty of misconduct in receiving information or impression from sources not in evidence or making experiments with articles not introduced in evidence, *while in court and during the trial of the case,* and his receiving information or impressions from sources not in evidence or making experiments with articles *outside of the courtroom,* we fail to understand.

Indeed, we are inclined to believe that to permit a juror to so misconduct himself as to receive information or impression *while in the courtroom and during the actual trial,* or to permit him to make experiments with articles not in evidence *while in the courtroom and during the trial of the court* and *with the apparent sanction of the court and of the prosecuting offi-*

cers, constitute irregularities and acts of misconduct and substantial errors much more flagrant than where the irregularities or acts of misconduct are committed outside of the courtroom and therefore beyond the knowledge and control of the court and of the prosecuting officers.

A case very much in point is that of *Whitney* v. *Whitman,* 5 Mass. 315-316 (405-406 of old edition), where it appeared that:

> "In this action, after the parties were heard, and the judge had summed up the evidence, and given the jury the necessary direction in matters of law, when the papers were delivered to the jury, a material paper, *not read in evidence,* was delivered to them by mistake, which was not discovered until the jury had returned into court, and had delivered their verdict.
>
> "The party against whom the verdict was found now moved the court for a new trial for this cause.
>
> "On examining the paper, it appeared to the court to furnish material evidence in favor of the party prevailing; but he moved the court to examine some of the jurors, *to prove that they were not influenced by it in finding their verdict.* The other party had also summoned other jurors to prove the influence.
>
> "THE COURT REFUSED TO EXAMINE ANY OF THE JURORS, AND OBSERVED THAT THE COURT MUST BE GOVERNED BY THE TENDENCY OF THE PAPER APPARENT FROM THE FACE OF IT; THAT IT WAS NOT PRETENDED THAT THE JURY HAD NOT READ IT, AND IT WOULD BE DIFFICULT FOR JURORS, WHERE, AS IN THIS CASE, THERE WAS MUCH EVIDENCE OF

DIFFERENT KINDS, CLEARLY TO DECIDE IN WHAT MANNER THEIR MINDS WERE INFLUENCED IN FORMING THEIR VERDICT. AS IT WAS RECEIVED BY THE JURY AMONG OTHER WRITTEN EVIDENCE, AND READ BY THEM, IT MUST BE PRESUMED THAT THEY CONSIDERED IT AS EVIDENCE, AND GAVE DUE WEIGHT TO IT.

"The verdict was therefore set aside and a new trial granted."

In the case of *Hicks* v. *Drury,* 5 Pick. 297-*303*, also reported in 22 Mass, 296, *302*, it was said:

"So where a paper which is *capable of influencing* the jury on the side of the *prevailing* party, goes to the jury by accident, and is read by them, the verdict will be set aside ALTHOUGH THE JURY MAY THINK THAT THEY WERE NOT INFLUENCED BY SUCH PAPER, *FOR IT IS IMPOSSIBLE FOR THEM TO SAY WHAT EFFECT IT MAY HAVE HAD ON THEIR MINDS."*

(Citing *Benson* v. *Fish,* 6 Greenl. 141.)

The Assistant District Attorney has admitted in this case that:

"The record shows that it was exhibited to the jury and we admit that the block of iron was in the court and was on the panel there for awhile and that it was examined by one of the jurors. I don't admit he fitted it in. I admit that experiments were made with it."

It is now idle and absurd to claim that no substantial injury was done to the defendants by what

was done in court with the "square block of iron" or that the jurors *could not have been* influenced thereby.

Why was the square block of iron referred to at all during the trial, if it was so inconsequential? Why was it permitted to be brought into court and exposed for an appreciable length of time to the gaze of the jurors and placed on the panel right in front of the first row of jurors, if it was so inconsequential? Why was the witness Costanzo permitted to testify that he had found the square block of iron in the basement of the house where two months previous to the finding defendant Karr had lived, if it was so inconsequential? Why did the juror Shepard call for it during the examination of Mrs. Karr if it was so inconsequential and had not made an impression on his mind? Why was the juror Shepard afterwards again permitted to call for it, during the examination of the witness and chemist Green, and, over the protest, objections and exceptions of the attorneys for the defendants, with the sanction of the court and prosecuting officers, permitted to examine closely the square block of iron in the presence of the other jurors, although it was not then in evidence and was never thereafter admitted in evidence, and to experiment with the same and to fit in a five dollar gold piece in one of the cavities on one side of the square block and a nickel or five cent piece on the other side of the square block and to make comments with reference thereto and with reference to the purpose of his experiments (all of which is shown by the Bill of Exceptions), if it were so inconsequential and had not

made a deep and prejudicial effect upon his mind and upon the minds of the rest of the jurors?

Why were all of these things permitted to be done and said by the prosecuting officers, in their frantic desire for a conviction, if the "square block of iron" were so inconsequential?

We think we may aptly paraphrase the language used in the case of *Hicks* v. *Drury, supra,* as follows:

> "So where a square block of iron which is *capable of influencing* the jury on the side of the *prevailing party,* goes to the jury by accident" (in the case at bar by design) "and is seen and experimented upon by them, the verdict will be set aside, ALTHOUGH THE JURY MAY THINK THAT THEY WERE NOT INFLUENCED BY SUCH SQUARE BLOCK OF IRON, *FOR IT IS IMPOSSIBLE FOR THEM TO SAY WHAT EFFECT IT MAY HAVE HAD ON THEIR MINDS.*"

The record shows that the juror Shepard considered that there was "some impression on here that would look as though it were the face of a coin, and also on the opposite side. I want to ascertain the size of the coin that would fit in there, and if it were possible by placing a coin there that you could cover it with plaster of paris, and ascertain whether it could become a mould for a coin." (Transcript of Record, p. 287.)

Again the juror said in open court, after actually experimenting with a five dollar piece to see if the five dollar piece would fit in the cavity or impression which looked like a five dollar piece (all this in the

presence of the other jurors and with the apparent sanction of the court and prosecuting officers, and against the protest, objections and exceptions of the attorneys for the defendants):

> "The only point is, that THIS HOLE ON THIS SIDE IS THE SIZE I THINK OF A FIVE DOLLAR PIECE AND THE OTHER SIDE IS THE SIZE OF A NICKEL. I MAY BE WRONG AND I MAY BE CORRECT. (After further experiments): *THIS IS THE SIZE OF A FIVE DOLLAR PIECE THERE* and this appears to be the size of another coin, I don't know what." (Transcript of Record, p. 288.)

And again the juror Shepard said, addressing the court:

> "The point I had, your Honor, was that it might possibly be used as a basis for making moulds and not as a mould itself." (Transcript of Record, p. 288.)

How any one can read this record dispassionately, in view of all the evidence presented of a circumstantial nature as to the passing and attempted passing by Karr of a five dollar gold piece and of the claim by the Government that the 27 five dollar gold pieces found in the rear of Longer's saloon were at some time—when, no one knows—in the possession of York, and of the other evidence as to the finding of alleged counterfeiting material in the basement of Karr's home or residence, and then contend that the actions, experiments, statements of the juror Shepard in the presence of the other jurors in fitting in a five

dollar gold piece into the cavity on one side of this square block of iron and the jurors' exclamations and statements in that connection, did not, and *could not,* have prejudiced the defendants or caused them substantial injury, is incomprehensible.

The entire proceedings, as to the square block of iron, were irregular; they constituted inexcusable acts of misconduct on the part of the juror and of the Secret Service Agents and of the prosecuting officers and they seemed to have, judging from the record, the sanction and approval of the Court.

They resulted in substantial injury and prejudice to these defendants. *The presumption of law is that they did.* The burden of proof, to repel that presumption and satisfy this appellate court that they did not result in prejudice, is on the prosecution. The prosecution has signally failed to repel that presumption of substantial injury and prejudice growing from the irregularities and acts of misconduct disclosed by the record. If this Court entertain any doubt as to whether the irregularities, errors and acts of misconduct were harmful to the defendants, or either of them, it is in duty bound to resolve that doubt in favor of the defendants. Some of the authorities even go so far as to lay down the rule that if the Court has "the slightest doubt" as to whether harm was done to the defendants, it should grant a new trial.

Balliett v. *U. S.,* 129 Fed. 689, *696;*
Sprinkle v. *U. S.,* 150 Fed. 56, *59,* s. c. 205 U. S. 542, 51 L. Ed. 922;
Williams v. *U. S.,* 158 Fed. 30, 36;
Pettine v. *Terr. of New Mexico,* 201 Fed. 492.

It must be further remembered that the defendants were not charged with making counterfeit money or with making moulds for the purpose of making counterfeit money. They were simply charged with a conspiracy to pass counterfeit $5 gold pieces. Even the Secret Service Agents conceded that. (Transcript of Record, pp. 85, 86, 298.)

It will undoubtedly be contended by the learned United States Attorney, as it was in the Court below on the motion for a new trial, that the trial Judge cured this grievous error by giving a cautionary instruction to the jury in the following words:

> "You are not to consider any testimony or exhibits or matters or things exhibited to you during the trial unless the same were admitted in evidence by the Court, and you are not permitted to allow yourselves to be influenced by anything in this case outside of the testimony, evidence and exhibits which have been actually admitted and are in evidence. In other words, you must try this case and determine the guilt or innocence of these defendants solely and exclusively upon the testimony, evidence and exhibits introduced in this case and nothing outside of that." (Transcript of Record, pp. 312-313.)

Did such cautionary instruction cure the grave acts of misconduct and irregularities complained of and effectually sweep out of the minds of the jurors the deep, lasting and prejudicial impressions against the defendants that must have resulted from their experiments in fitting in a $5 gold piece into one of the cavities of the "square block of iron" and a nickel

piece into the other cavity of the "square block of iron," which was never admitted in evidence?

The Supreme Court of the United States in the leading case of *Waldron* v. *Waldron,* 156 U. S. 361, 39 L. Ed. 453, in considering the function of cautionary instructions, laid down the rule that even a cautionary instruction will not cure an error where the error committed was *of so serious a nature that it must have affected the minds of the jury despite the correction by the Court.* The syllabus reads as follows:

> "(7) It is the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, the cause of reversal is thereby removed, *unless the error committed was of so serious a nature that it must have affected the minds of the jury despite the correction by the court.*"

In that case, it appeared that certain improper and incompetent evidence was admitted and that, in the arguments of counsel to the jury, certain improper remarks were made. The trial court sought to cure the errors arising from the matters above mentioned in the following language:

> "The evidence also taken on the trial of that case is not competent evidence against the defendant in this case, and was also excluded. She, not being a party thereto, is not permitted to appear and cross-examine the witnesses. Nor should the jury assume or infer from anything in evidence in this case that the judgment of divorce was granted upon the ground of adultery, as that is not one of the grounds alleged in the bill of

complaint, nor upon any ground of—for any of the causes having reference to the conduct of the defendant in this case. *Such an inference has been sought to be drawn by counsel from the proceedings in that case, but it is an inference not warranted by the record in evidence and unfair towards the defendant. The jury will try this case upon the evidence produced on this trial, and not assume or infer that other evidence might have been produced here or was produced in some other case to which the defendant was not a party.*"

This cautionary instruction was practically the same as that given in the case at bar.

Mr. Chief Justice White, delivering the opinion of the Supreme Court, said, of the futility of such cautionary instruction after serious error—damage—has been done to a party:

"We come now to the last contention, which is this, that, conceding misuse was made of the record and other evidence, yet, as the misuse was corrected by the final charge of the court, therefore the error was cured. Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. *State* v. *May*, 15 N. C. 330; *Goodman* v. *Hill*, 125 Mass. 589; *Smith* v. *Whitman*, 6 Allen 562; *Hawes* v. *Gustin*, 2 Allen, 506; *Dillin* v. *People*, 8 Mich. 369; *Specht* v. *Howard*, 83 U. S. 16 Wall. 564 (21:348). *There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to*

have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court. The rule and its exception were considered in *Hopt* v. *Utah,* 120 U. S. 430 (30:708), where the foregoing authorities were cited, and the principle was thus stated by Mr. Justice Field: 'But, independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted its subsequent withdrawal from the case with its accompanying instruction cured the error. *It is true that in some instances there may be such strong impression made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error, but such instances are exceptional.'*

"The case here, we think, comes within the exception."

The doctrine announced by the Supreme Court of the United States in that case is directly applicable to the particular circumstances attending the experiments of the jurors with the "square block of iron" not in evidence. It must be plain that the cautionary instruction given to the jury, after the damage was done to the defendants, was of no efficacy at all.

If such be the rule in civil suits, how much stronger should be its application to prosecutions involving the liberty of the citizen.

Another authority apposite to the case at bar, upon the proposition that a subsequent instruction of the court will not always cure a serious irregularity or act of misconduct on part of the jury or of the prosecuting officers, or a substantial error taking place during the

course of the trial, is the case of *Lathan* v. *United States,* 226 Fed. 420, *425*. That was a decision of the Circuit Court of Appeals for the Fifth Circuit. It there appeared that:

> "The District Attorney, in closing the case for the Government, made the statement that, had the train not been three hours late, he would have had another witness, who would have testified that he also had been defrauded. The defendant's counsel immediately objected, and the objection was sustained by the court, and the jury *properly cautioned not to consider said statement of counsel.*
>
> "The defendants' counsel assigned these remarks as error in his 27th assignment. The almost unbroken line of authorities hold that it is to the action of the court upon the objection to which error may be assigned; that, if the court stops counsel and cautions the jury, this cures the violation of the defendant's right to a trial and verdict on the testimony of witnesses, and not statements of counsel not based on testimony. And in ordinary cases this is the correct rule. *Yet in each of the cases expressions will be found which militate against this view in exceptional cases.*
>
> *"Every one must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the remarks of counsel,* and ALTHOUGH THE JURY HONESTLY TRIED TO IGNORE THAT IMPRESSION IT STILL ENTERS INTO AND FORMS A PART OF THE VERDICT. *In such cases the trial court should set aside the verdict on motion for new trial.* The language of Justice Fowler, in *Tucker* v. *Henniker,* 41 N. H. 325, is pertinent, and applies with great force to criminal prosecutions:

"'Yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the *slightest degree influenced the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened.*

* * * IT IS UNREASONABLE TO BELIEVE THE JURY WILL UTTERLY DISREGARD THEM. THEY MAY STRUGGLE TO DISREGARD THEM. THEY MAY THINK THEY HAVE DONE SO, AND STILL BE LED INVOLUNTARILY TO SHAPE THEIR VERDICT UNDER THEIR INFLUENCE. * * * TO AN EXTENT NOT DEFINABLE, YET TO A DANGEROUS EXTENT, THEY UNAVOIDABLY OPERATE AS EVIDENCE WHICH MUST MORE OR LESS INFLUENCE THE MINDS OF THE JURY, NOT GIVEN UNDER OR WITHOUT CROSS-EXAMINATION, AND IRRESPECTIVE OF ALL THOSE PRECAUTIONARY RULES BY WHICH COMPETENCY AND PERTINENCY ARE TESTED."

So, take it in the case at bar, it would be idle for the court to rule out incompetent, or immaterial, or irrelevant evidence, or exhibits, if the jury are allowed to consider such evidence or exhibits during the trial, although the same have never been admitted in evidence.

Com. v. *Edgerly,* 10 Allen. 184;
Stewart v. *R. R. Co.,* 11 Iowa 62.

New trials are often granted because improper evidence has been permitted to be given in the hearing

of the jury, ALTHOUGH THEY ARE *AFTERWARDS* INSTRUCTED TO DISREGARD IT.

Penfield v. *Carbenter,* 133 Johns 350;
Irvine v. *Cook,* 15 Johns 239.

As was well said by Circuit Judge, now Mr. Justice, Day, in *McKnight* v. *United States,* 115 Fed. 972, *983,* of the futility of the cautionary instruction given in that case after the damage was done to the defendant:

> "We are of the opinion that what was said by the trial Judge in response to the objection of counsel as to the right of the defendant to testify was *not cured by any subsequent statement to the jury upon that subject.*"

In the case of *Nelms* v. *State,* 13 Spedes & Marshalls, 500-*508,* the Supreme Court of the State of Mississippi said, through Mr. Chief Justice Sharkey:

> "THE PURITY OF TRIAL BY JURY MUST BE STRICTLY GUARDED. THE VERDICT WHEN RENDERED SHOULD COMMAND ENTIRE CONFIDENCE; WHATEVER MAY DETRACT FROM THAT CONFIDENCE, MUST WEAKEN THE SECURITY WHICH IS FELT BY THE COMMUNITY IN THIS MODE OF TRIAL. * * * IT IS DANGEROUS TO PERMIT A VERDICT TO STAND WHICH IS LIABLE TO SUSPICION."

As was well said by the Supreme Court of the State of California in *People* v. *Mitchell,* 100 Cal. 328:

> "It is unfortunate for the jury system, and for the cause of justice, that such episodes should oc-

> cur in the trial of causes, but the evil will be soonest suppressed by wiping out verdicts rendered under such circumstances."

As we confidently believe that a reversal must follow and a new trial be ordered, due to the serious and grave errors to which we have already called the attention of this Appellate Court, we do not elaborately argue other errors claimed by us.

The three important errors are:

First: The remarks of the trial Judge, practically compelling the defendant York to take the stand as a witness in his own behalf;

Second: The refusal of the trial court to admit the exculpatory letter of defendant York in answer to the accusatory letter sent to him by his brother at the instigation of Chief Secret Service Agent Moffitt;

Third: Permitting the jurors to experiment with an article not in evidence, especially when it appears that the defendants were not charged with a conspiracy to manufacture counterfeit money or to make moulds.

While we are satisfied to present our contentions and arguments in support of these three principal points, still we do not wish to be understood as having abandoned or waived a number of other points set out in the assignment of errors.

However, we will attempt to do no more than to state these other erroneous rulings without undertaking to elaborate upon them either by argument or by citation of authorities.

IV.

The trial Court erred in permitting evidence to go to the jury of an attempted passing of a $5 counterfeit gold coin by the defendant York in the year 1914, fully six months *previous* to the formation of the conspiracy alleged in the indictment as taking place in Oakland, California, on January 1, 1915.

This error is covered by the following assignments:

> "(III) The Court erred in overruling the objections made by the attorneys for the defendants to the introduction in evidence of the testimony of the witness David M. Boyle."
>
> "(IV) The Court erred in overruling the objections made by the attorneys for the defendants to the questions propounded to the witness David M. Boyle, on his direct examination, a witness called for the United States, which question was as follows:
>
> "'MR. PRESTON: Q. Did you, in the year 1914, have a transaction with reference to a $5 gold coin?'"
>
> "(V) The Court erred in overruling the objection made by the attorneys for the defendants to the question propounded to the witness David M. Boyle, on his direct examination, a witness called for the United States, which question was as follows:
>
> "'Q. Describe the coin transaction?'"
>
> "(VI) The Court erred in refusing to grant the motion of the attorneys for the defendants to strike out all of the testimony of the witness David M. Boyle." (Transcript of Record, pp. 377-378.)

See, also, Assignments of Error numbers VIII, IX, XXVII. (Transcript of Record, pp. 379, 383.)

The views of the prosecution, in offering to prove a transaction not included within any of the overt acts

in furtherance of the conspiracy charged in the indictment, the objections and exceptions of counsel for the defendants, and the views of the trial court will be found fully set out in the Transcript of Record, on pages 51, 52-54, 56.

At the close of the Government's case counsel for defendants renewed a motion to strike out all of the testimony relating to the Boyle transaction, which was denied and exception taken. (Transcript of Record, pp. 123-124.)

As we have stated, the Boyle incident antedated the conspiracy charged in the indictment to have been entered into on January 1, 1915, by several months. The defendants had no notice of such an episode until they were actually on trial. It was not one of the overt acts alleged against them. The rule is well settled that:

> "If, however, overt acts are specified in the indictment, the proof must be confined to the acts so specified."
> 8 Cyc. 684.

V.

The trial Court erred in permitting testimony as to the finding of certain articles in the basement at 4405 West Street, Oakland, where defendant Karr and his family had formerly lived, it appearing that he had moved from there in August, 1915, and that the conspiracy was consummated and ended on July 9, 1915, at Stockton, California, and it appearing that the premises had been vacant and accessible to anybody for two months before the alleged discovery of the articles referred to. That thereafter it was occupied by some foreigners who could not be found at the time to testify at the trial.

The objections to this testimony and to a number of articles introduced as exhibits are conserved by several assignments of error, which may be grouped together, as follows: Numbers XII, XIII, XIV, XV, XVII, XVIII, XIX, XXIII, XXIV, XLVI, XLVII, XLVIII, XLIX, L. (Transcript of Record, pp. 380, 381, 382, 388-389.)

It was contended by counsel for defendants that all of this evidence as to what transpired two or three months after the end and consummation of the conspiracy, if any ever existed, was immaterial, irrelevant and incompetent and entirely too remote, and that the articles could not be introduced, not being connected with the defendants by sufficient legal evidence. It is important to appreciate that these articles were claimed by the prosecution to have been used in counterfeiting operations and they sought to show that the basement had been used for such purpose.

It is well settled that acts or declarations of con-

spirators after the crime is committed, are inadmissible to prove a conspiracy to commit it.

People v. *Irwin,* 77 Cal. 502.

The conspiracy, if any there was, terminated with the arrest of the defendants.

State v. *Grant,* 86 Iowa, 216, 53 N. W. 120.

Furthermore, the defendants were not charged with a conspiracy to manufacture counterfeit coin but with a conspiracy to pass counterfeit $5 gold pieces.

VI.

The Court erred in admitting in evidence the 27 counterfeit $5 gold pieces, found in the rear of Longer's Saloon in Stockton, California, on July 9, 1915.

This error is covered by Assignments numbers I and II. (Transcript of Record, p. 377.)

There was absolutely no evidence that the defendant Karr, who is charged jointly with the defendant York as having committed the overt act of the guilty possession of these 27 counterfeit $5 gold pieces, ever had them in his possession or that he ever was in Longer's Saloon.

The only pretense urged against defendant York was that he entered and went to the rear of Longer's Saloon. All this was previous to their arrest in Stockton.

The 27 coins were not discovered until several hours after the defendants had left Stockton for their homes in Oakland.

There was absolutely no evidence to connect either of the defendants with these 27 counterfeit coins except the most strained inference that because defendant Karr had had some trouble with a $5 coin, which he honestly considered genuine, as did the Captain of Police and others who saw the coin at the time, and because defendant York was with him at that time, that the possession of these 27 other coins must perforce, at some time or other, be attributed to the defendants. We respectfully submit that a mere reading of the testimony on this point will show the unreason-

ableness of any such contention and the extreme length to which the prosecution went in the case at bar in urging the admission of circumstantial evidence, to convict the defendants.

See especially the testimony of Guy M. Campbell, a bartender in Longer's Saloon. (Transcript of Record, pp. 40-43.)

See, also, testimony of W. L. Walker. (Transcript of Record, pp. 33-34.)

VII.

The trial Court erred in not granting the motion made by counsel for the defendants to have the jury visit the premises at 4405 West Street, Oakland, California, where the defendant Karr and his family formerly resided. (See particularly Assignment of Error No. XXVI; Transcript of Record, p. 383.)

The trial court permitted such a mass of evidence to be introduced relating to the condition of the basement at 4405 West Street, Oakland, California, where defendant Karr and his family had formerly resided, and long after he had moved away and after the end of the conspiracy, if any there was, that, in justice to the defendants, the jury should have been permitted to have seen the premises for themselves.

A reading of the testimony of the Secret Service Operative Isadore Costanzo (Transcript of Record, pp. 104-110); of Chief Secret Service Agent Moffitt (Transcript of Record, pp. 296-301); of Paul Montfort, who denied that he was secretly employed by the Secret Service Agents (Transcript of Record, pp. 65-70; pp. 94-102); will show that, although the defendants were not charged with a conspiracy to manufacture counterfeit money, a studied and labored effort was made by the prosecution to convince the jurors that the defendants had a counterfeiting plant at 4405 West Street, Oakland.

It was for the purpose of dissipating any impression in the minds of the jurors that the basement of 4405 West Street, Oakland, California, could be used for such purpose, that counsel for defendants, on two

separate occasions during the trial of the case, earnestly requested the trial court to permit the jurors to see the place and be satisfied for themselves, which were refused. In this, we respectfully submit, the trial court was guilty of a gross abuse of discretion.

VIII.

The trial court erred in refusing to give instruction No. 8 as follows:

> "You are further instructed that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and the accused must be found not guilty and acquitted unless the fact of their, and each of their, guilt is proven beyond every reasonable doubt, to the actual exclusion of every reasonable hypothesis or theory of their innocence consistent with the facts proven."
>
> (See Assignment of Error No. LII; Transcript of Record, p. 390.)

Inasmuch as the evidence against the defendants was almost entirely circumstantial and in view of the character and nature of the testimony presented against them, we think that the rights of the defendants would have been better safeguarded by giving the requested instruction.

IX.

The trial court erred in refusing to give instruction No. 27 as follows:

> "You are instructed that the testimony of informers, detectives and other persons employed in hunting up testimony in criminal cases should be scrutinized and weighed more carefully than that

given by witnesses who are wholly disinterested, because of the natural and unavoidable tendency and bias of the mind of such person to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged."

(See Assignment of Error No. LIV, Transcript of Record, p. 391.)

The record will disclose that the only important evidence against the defendants emanated from informer Louis Stemmer (Transcript of Record, pp. 21-32; from Detective T. J. McKenzie (Transcript of Record, pp. 33-40); from Detective W. L. Walker (Transcript of Record, pp. 43-45); from Captain of Police Michael Finnell (Transcript of Record, pp. 114-116); from Secret Service Agents Moffitt (Transcript of Record, pp. 76-80, 80-94, 296-301); Foster (Transcript of Record, pp. 56-64); Costanzo (Transcript of Record, pp. 104-110); Paul Montfort (Transcript of Record, pp. 65-70, 94-102, 295-296), and from saloon men and bartenders.

In view of this class of evidence, we considered it highly important to the defendants that the jury should have been instructed as requested by us.

Without further prolonging this Opening Brief, we respectfully submit that a reversal must follow and the defendants be given a new trial.

Before this Appellate Tribunal can affirm the judgment of conviction now standing against the defendants, it must be *"able to say with certainty," "that the*

defendant was not prejudiced" by the rulings, remarks, instructions, irregularities and acts of misconduct on the part of the jurors and prosecution and trial court complained of by the defendants.

To use the apposite language of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Balliet* v. *United States,* 129 Fed. Rep. 689, *696:*

> "Moreover, *we are not able to say with certainty, as we must be to uphold the verdict,* that the *defendant was not prejudiced by the instruction."*

As was well said by Judge Vann, in *People* v. *Wolf,* 183 N. Y. 464, *472,* 76 N. E. 592, *594:*

> "An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial Judge. However strong the evidence against the defendant may be, if she did not have a fair trial, as shown by the rulings of the court, * * * the judgment of conviction should be reversed and a new trial ordered so that she may be tried according to law."

Respectfully submitted.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs in Error.

H. L. LEVIN,
Of Counsel.

APPENDIX

(ENVELOPE)

— Ontario (Canadian Stamps)

(Toronto
Sep 18
9:30 A.M.
1915)

Mr. O. S. York,
5333 - James Ave.
Oakland,
Calif.
U.S.A.

(U. S. DIST. COURT.
No. 5792.
U. S. v. York & Karr.
Deft. Exhibit No. "I" (for Ident).
Filed—Jan 21, 1916.
W. B. Maling, Clerk,
By Lyle S. Morris, Deputy Clerk.

(Envelope & Letter).

London, Ontario, Canada
Sept. 16 - 1915.

Dear Bro: & Family:—

I recd. your letter written to me in Columbus, Ohio. I had laid off and was on my way to find a

better job with better conditions, hence, the delay on reply. I was not quite making living expenses, let alone saving any thing on the Columbus job. I was the youngest man on extra list so naturaly stood to be cut off the list first which would not doubt be done in the next few weeks then the winter would be close and I would be out of employment, so I laid off and am looking for something better. I found from traveling there was nothing in the middle states or South, or east, so it was up to me to start north. Just ask Supt. of C. P. R. here but there isn't much doing now, so will keep on going and if I find nothing on my travels will probably go west into B. Columbua, then south again. Have had no trouble in traveling, as all conductors belong.

Now in regards to the main subject of your last letter, which you are not doubt waiting a reply, will state, that no doubt my reputation can carefully be checked back to may infantency and I am sure you or anyone else will find that it is clear and clean, that I was never arrested, never was connected with crooks (if I knew it) am not now, or never will be, if it can be prevented, have always worked for an honest living, am now, and expect I always will, as I have no education or training to make a living otherwise. I can't help what suspicion I am under, what Mr. Moffitt says he know, about me, or what he or any one else thinks or does, and am perfectly inocent of intentionaly or knowingly violating any law, my inocents being to this extent. I am not the least bit affraid to converse, correspond or meet any one in the workd upon any

subject concerning my caracter or doings, I have already been detained at Columbus and taken up for investigation charged, or accused of being a wire tapper, of which I believe I wrote you. Me or any one else is subject to subject to such things, but why fear the law or any man if one know in his own heart and soul he is inocent of any and all charges placed against him.

I always saved my money, to the extent that I had quite a little start in life, and I know this caused jelously among my so called friends, I did not see the peace in the paper about me, you spoke of, but feel sure if there was one there must of been some scandal among the railroad knockers.

Mr. Moffett, or any of the law enforcers of the world, certainly must be mistaken regarding me, as they no doubt have been mistaken before in their career.

I will keep you posted in future of any where abouts, and it will be my wish, if any one desires to know where I am or what I am doing, for you to readly give all information concerning me & my where abouts so as to assist in clearing the cloud of suspecion which you say hangs over me.

I have now given you all the information I posess concerning the above case, and you need not worry that my actions or conduct will, intentionaly ever bring disgrace upon you, your family or our dear old father & mother who, I feel are always proud of us two boys.

Of course, one could be picked up on suspicion in

this country also, on acct. of the war conditions, etc., but why should I worry when I know I have done no injustice to anyone.

Knowing you was never in this country I will explain to you some of the conditions I find in this location a rich nice clean country with a fine clean race of people, very polite, etc. From what I can learn the railroad conditions far exceed that of the states, to the extent that one with a good service letter with a conductors experiance can hire out right as conductor, the big grain rush is now on further north and I hear they need men, so I can see no reason why I should not meet with success.

I can't give you definite address at this writing but will drop you a line often.

This traveling is no pleasure I assure you, & hope you never have any faily troubles that would cause one to get the bumps I have experienced.

As ever, I remain your

Bro with love to all.

Rol.

(NO. 5794.
U. S. vs. York & Karr.
(Part) Deft. Exhibit No. "I" (for Ident).
(5 pages)
1/21/16 LSM. Deputy Clerk.

APPENDIX.

INDEX OF WITNESSES

As Contained in Transcript of Record.

No. 2890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROLLIE A. YORK and ED. KARR,
Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

On Writ of Error to the District Court of the United States for the Southern Division of the Northern District of California, First Division

JOHN W. PRESTON,
United States Attorney.

M. A. THOMAS,
Asst. United States Attorney,

Attorneys for Defendant in Error.

Filed this ..... day of March, 1917.

FRANK D. MONCKTON, Clerk,

By ..... , Deputy Clerk.

NEAL PUBLISHING CO. PRINT, SAN FRANCISCO.

No. 2890.

IN THE

United States Circuit Court of Appeals

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ROLLIE A. YORK and ED. KARR,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

Counsel for plaintiffs in error has made a long statement of the case which is not accurate and is colored to serve the purposes of his argument. The facts in the case appear to be more complicated than they are, for the reason that a considerable part of the testimony refers to evidence of things found in the basement of a dwelling at 4405 West Street, Oakland, where the defendant, Karr, had lived during the time of the conspiracy. This testimony was introduced for the purpose of showing intent and guilty knowledge, but it is not really

necessary to the case, and has a tendency to confuse the main issues.

The indictment charges that on the first day of January, 1915, at Oakland, in the County of Alameda, in the State and Northern District of California, Rollie A. York and Ed. Karr wilfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspired, combined, confederated and agreed together and with divers other persons whose names are to the Grand Jurors unknown, to wilfully, etc., with intent to defraud, pass, utter, publish and sell certain false, forged and counterfeited coins which as they and each of them at all times in the indictment mentioned, well knew, were false, forged and counterfeit, and in the likeness and similitude of the genuine gold coins of the United States known as and called half eagles or five dollar pieces.

The indictment charges that the conspiracy existed at the time of all the overt acts set forth, and then sets up a number of overt acts as enumerated by counsel for plaintiffs in error in his brief at pages 7, 8 and 9.

The evidence shows that plaintiffs in error were married men, and had been in the employ of the Southern Pacific Company as brakemen and conductors. Karr was discharged from the Southern Pacific on about November 1st, 1912, and York quit about July 22nd, 1913. They both subsequently, while living in Oakland, took an examina-

tion for positions on the Oakland Police Force where they served for about a month when they resigned and went into the jitney business. They pursued the jitney business for a short time and then gave that up, after which York assisted his wife in securing subscriptions for Orchard and Farm, working for a prize. The record shows at pages 251-3 of the Transcript that in May, 1915, York and his wife won $1250 in a lottery. Karr apparently did nothing for a considerable period of time before the trip to Stockton, during which a number of the overt acts were committed.

There is in the record material evidence supporting every one of the overt acts alleged, and the verdict is well supported by the evidence as will appear from a reading thereof. It is a story of two trainmen, one of whom is discharged, and the other of whom resigns in anticipation of being discharged. They do nothing for a while and then get on the police force. This gives them a certain standing in the community and affords them certain immunity from suspicion on account of the unlawful business which they have undertaken. When they have secured the benefit of this by serving a month, they quit and take up the jitney business. This gives them an opportunity to change money and circulate through the community. They soon give this up however, and devote practically all of their time to their illegal occupation and the community is flooded with counterfeit $5 coins.

York at Oakland, is on two occasions proved to have passed or attempted to pass counterfeit $5 coins, as is shown by the testimony of Harry Collinbell and Robert Mulholland. He and Karr finally go to Stockton, York carrying the supply of counterfeits, and Karr doing the actual passing. The counterfeit is so good, and they have been so successful in passing them, that Karr when he has one of them turned down by Robert Eickhoff in one saloon, immediately goes to another saloon and passes the counterfeit $5 coin on Newton Jones.

It will be observed that while in Stockton, the men do not travel together all the time, but each takes a different course, and the two meet occasionally. This is for the purpose of avoiding suspicion in the event the man who does the passing, should be arrested and searched. No counterfeit coins would be found on him except the one he was engaged in passing, nor would an excess amount of silver be found on him for the reason that his partner, York, in this case, carried the surplus silver and the supply of counterfeit coins.

The two men, as is shown by the Transcript, were under suspicion and were being followed after the attempt was made to pass the counterfeit coin on Robert Eickhoff, and according to their statement after they were arrested, as appears at page 40 of the Transcript in the testimony of J. T. McKenzie, they noticed fellows watching them and wanted to get out of the way. It was on this ac-

count, as appears in the testimony of McKenzie at page 39 of the Transcript, that York went into Longers' Saloon and as appears at the middle of page 34 of the Transcript, he went all the way to the back of the saloon to the entrance of the toilet. It was then, after having noticed the fellows watching him, that he got rid of the 27 counterfeit $5 coins which were found by the witness Campbell in the flush box of the toilet in Longers' Saloon.

As evidence of the fact that York carried the silver collected, as well as the stock of counterfeit coins to be passed, it should be noted that when the men were taken to the Station by the Stockton Police and searched, Karr had only $4.80 in silver on his person (Tr. p. 306), while York had $42.80, all in silver (Tr. p. 35). It appears from the testimony of Robert Eickhoff that when Karr attempted to pass the counterfeit $5 coin on him in his Stockton Saloon, and he refused the coin, Karr gave him another $5 coin and took change, Eickhoff taking out the price of a drink of whiskey, (Tr. p. 21) Karr then went immediately to the Rex Bar and passed the counterfeit $5 coin on Newton Jones, and carried away $4.90 in change. (Tr. p. 22.) Karr should therefore, have had when arrested shortly thereafter, almost $10 in silver, and would have had, but for the fact that after leaving Eickhoff's saloon he gave the silver to York so that he would have an excuse for offering the counterfeit $5 coin to Newton Jones.

Another circumstance against the plaintiffs in error is the fact that although Karr offered to make good the counterfeit $5 coin he had passed on Newton Jones—which he stoutly asserted was not counterfeit—by leaving with the Stockton Police $5 for Jones in the event the coin should be found to be bad, he never made any further inquiry about the matter, or called for his $5 which he had left with the Police, either in person or by letter, although according to the testimony, he and York were both for months afterwards, in great need of funds.

I.

THE VERDICT IS SUPPORTED BY THE EVIDENCE AND SHOULD NOT BE DISTURBED.

The alleged fact that the verdict was against the weight of evidence as argued in counsel's opening statement, may not be considered if there was any evidence proper to go to the jury in support of the verdict.

Humes vs. *U. S.* 170 U. S. 210; 42 L. Ed. 1011.

Crumpton vs. *U. S.* 138 U. S. 361; 34 L. Ed. 958.

Moore vs. *U. S.* 150 U. S. 57, 61; 37 L. Ed. 996.

The brief review of the evidence as disclosed in my opening statement, and even in the opening statement of counsel for plaintiffs in error, shows that

there was material evidence to support the charge of conspiracy and each overt act therein contained.

II.

THE TRIAL COURT DID NOT COMPEL THE PLAINTIFF IN ERROR YORK TO TAKE THE STAND, AND NO ERROR WAS THEREFORE COMMITTED.

The remark of the trial court appearing on page 236 of the Transcript, and to which counsel raised no objection at the time, and to which he so strenuously objects now, was at most an observation of the Court with regard to the weight of two kinds of testimony, the one being a self-serving letter not under oath, and the other the testimony of a witness. It is a reference to the testimony of one of the plaintiffs in error, but was not a demand or a request that he should take the stand. It is distinguished from the class of statements sometimes made by prosecuting attorneys, and which are held to be prejudicial because in such statements the jury is asked to draw an inference of guilt from the fact that the defendant did not take the stand.

Furthermore, in the case at bar, counsel for plaintiffs in error immediately stated that plaintiff in error York would take the stand, which he subsequently did, and which in my opinion, counsel always intended he should. The jury therefore, had no op-

portunity to draw any inference, and if defendant York was forced on the stand, his counsel did not discover it until he read the Transcript preparatory to suing out this writ of error.

III.

IF ERROR WAS COMMITTED BY THE COURT IN MAKING THE REMARK WHICH IS THE BASIS OF ASSIGNMENT OF ERROR NUMBER 33 (Tr. p. 385), IT WAS WAIVED BY THE FAILURE OF COUNSEL FOR THE PLAINTIFFS IN ERROR TO OBJECT, REQUEST AN INSTRUCTION TO CURE THE ERROR, AND SAVE AN EXCEPTION TO THE COURT'S RULING THEREON.

The remark of the trial judge that "the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving", was made at the time counsel for the plaintiffs in error made a third unsuccessful effort to introduce in evidence a self-serving letter written by the defendant York to his brother in answer to a letter which he had received from his brother concerning the accusation of the Secret Service operatives that plaintff in error York had been engaged in passing counterfeit $5 coins. The facts concerning the letter as disclosed by the record, are as follows:

Government witness Thomas B. Foster, in answer to no particular question on the subject, in relating conversations with the defendant York said:

> "I asked York what he had done with the letter that had been written him by his brother with reference to the cases and he said that he had destroyed it." (Tr. p. 38)

The witness also, as appears on the same page of the Transcript, testified that defendant York did not tell him what the subject matter of the letter was, or any part of it. As appears on page 61 of the Transcript, counsel for plaintiffs in error brought out on cross-examination from the witness Foster. the fact that an answer to the letter had been written by plaintiff in error York to his brother.

Government witness H. M. Moffitt, (Tr. p. 78) in direct examination in relating a conversation he had with defendant Karr, testified as follows:

> "I asked him if Mr. York had received a letter from his brother, and he said he had. I said 'Did you see the letter?' and he said 'Yes.' I asked him what the contents were and he said it was relating to a conversation that I had with his brother in Oakland about October 4th—or at least September 4th.
>
> Q. Did you say anything about whether or not this Stockton case had been taken up by the authorities.
>
> A. Yes.

Q. What did he say in that connection?

A. Well, he said York had written his brother a letter and in reply—

Mr. Woodworth. Q. What is that?

A. He said that York had written his brother a letter in reply to the one he had received, a registered letter I believe * * *"

On cross-examination at pages 83 and 84 of the Transcript, counsel for plaintiffs in error brought out from Mr. Moffitt a conversation which Mr. Moffitt had with plaintiff in error York's brother that he believed plaintiff in error York knew more about these counterfeit coins than he said he knew while in Stockton, and asked plaintiff in error York's brother to communicate with plaintiff in error York, and ask him if he would not give some information that would lead to the clearing up of this matter. The Government witnesses at no place, either in direct or cross-examination, however, testified as to the contents of the letter which plaintiff in error York's brother is supposed to have written to him, and the witnesses Foster and Moffitt both said that they did not know what the brother had written.

Counsel for plaintiffs in error, as the record shows, then attempted to introduce in evidence a letter which the plaintiff in error York had written to his brother in answer to the letter above referred to. The government objected on the ground that the letter was not proper evidence, and was self-serving, which ob-

jection was twice sustained before the incident referred to, when the trial judge made the remark objected to.

Counsel for plaintiffs in error, after he had unsuccessfully attempted to prove by the Government witnesses on cross-examination, the contents of the letter to plaintiff in error York, put O. S. York, the brother of plaintiff in error York, on the stand, and as appears from the Transcript, pages 234 to 237, proved the contents of the letter written to plaintiff in error York. Counsel then again offered the reply to the letter, which offer was rejected and refused by the Court, on the objection of the United States Attorney (Tr. p. 237), on the ground that it was a self-serving declaration by the plaintiff in error in his own interest, and not admissible. It was just prior to this ruling, as appears from the transcript, p. 236, that the following occurred:

"The Court: We are running up against that letter again.

Mr. Woodworth. I know we are.

The Court. My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving.

Mr. Woodworth. We will put York on the stand in order to get the record straight."

It should be noted that immediately following the remark by the Court, which is now considered so ob-

jectionable to the plaintiff in error, his counsel stated, "We will put York on the stand in order to get the record straight", and made no objection to the remark, asked for no instruction with regard to it, and took no exception to any action of the Court with regard thereto.

The rule is, "That one who, in a criminal trial, sees his right disregarded, yet does not object, waives it." (Bishop's New Criminal Procedure, Vol. 2, par. 980, sec. 6.)

This doctrine, and the reason therefor, is clearly stated in Bishop's New Criminal Procedure, Vol. 1, paragraphs 118 and 119, as follows:

> Sec. 118. DOCTRINE DEFINED. If, except where some counter doctrine presses with a superior force forbidding, a party has requested or consented to any step taken in the proceedings, or if at the time for him to object thereto he did not, he cannot afterward complain of it, however contrary it was to his constitutional, statutory, or common law rights."
>
> "Sec. 119. NECESSITY—is the chief foundation for this doctrine. Without it, a cause could rarely be kept from miscarrying. The mind, whether of the judge or the counsel, cannot always be held taut like a bow about to send forth the arrow; and if every step in a cause were open to objection as well after verdict or sentence as before, a shrewd practitioner could ordinarily so manage that a judgment against his client might be overthrown. Even by lying by and

watching, if he did nothing to mislead, he would find something amiss, to note and bring forward after the time to correct the error had passed. Should the pleadings be right, and only proper evidence be admitted, some question to a witness would appear in an objectionable form, or the judge would have dropped some word not absolutely square with the books, or omitted some explanation of law to the jury."

The rule is well settled that alleged prejudicial remarks cannot be taken advantage of on appeal or review, unless there is an objection and a request for a correction in proper time.

"Improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, unless the Court has been requested to instruct the jury to disregard them and has refused to do so."

12 *Cyc.* 585

"Objections to irregularities in the proceedings preliminary to and at the trial, cannot be first made on appeal; this applies to remarks or conduct of the presiding judge prejudicial to the accused, as well as to the remarks and conduct of counsel."

12 *Cyc* 814

See also,

People vs. *Molina,* 126 Cal. 505

People vs. *Shears,* 133 Cal. 154-159

State vs. *Reagan* (Wash.) 36 Pac. 472

State vs. *O'Keefe* (Nev.) 43 Pac. 918

Collins vs. *State* (Tex.) 148 S. W. 1065

Edwards vs. *State* (Tex.) 135 S. W. 540

People vs. *Babcock,* 160 Cal. 537

People vs. *Warr,* 22 Cal. App., 663

This Court has recognized this principle in the case of

Shelp et al vs. *U. S.,* 81 Fed. 694

In that case, the prosecuting attorney in his argument to the jury, made certain statements which were alleged to be prejudicial to the defendant. The Court at page 697, said:

> "It is a sufficient answer to this claim to state that no objection was made to the remarks of counsel at the trial, and no exception taken thereto. If the statement of counsel was improper, exception thereto ought to have been promptly taken. The question whether the remarks of counsel were improper cannot be considered by this court in a case where the point was not raised or exception taken until after the trial. It is undoubtedly within the power of the trial court, with or without objection, to promptly interfere when counsel attempt to influence the jury by a reference to facts not in evidence, or makes any appeal to prejudice the jury dehors the record, or comments upon the character of the defendant when his character has not been put in issue. But the rule is well settled that improper remarks of counsel not made the sub-

ject of an exception will not be considered on appeal."

By readily offering to make the defendant York a witness on his own behalf, counsel did not give the Court an opportunity to cure the error, if error there was, but raised the question for the first time after verdict. This practice should not, and I think will not, be sanctioned by this court.

Cases are cited by counsel at pages 35 and 36 of his brief for the proposition that error will be noticed by a reviewing court, although the question was not properly raised at the trial by objection and exception.

In the Wiborg case, the Supreme Court held that the evidence did not sustain the verdict against two of the defendants, and reversed the judgment against them, although there was no request made at the trial that the jury be instructed to find for them, and consequently no ruling was made or exception taken on that point. But that was an entirely different matter from an irregularity in the trial which may have been cured if counsel had objected rather than agreed to what was done.

In the Crawford case at the bottom of page 35 quoted from by counsel, the question arose upon an objection to a juror made by counsel for the defendant and exception to the Court's adverse ruling thereon. The juror was challenged for cause in that he was a "salaried officer of the United States". The Supreme Court observed that even though he was not

a salaried officer of the United States, which would make him exempt, although not incompetent on that ground alone, yet the examination showed that he was a civil employee of the United States and subject to challenge for cause on account of such relation, in a case where the United States was a party. The Supreme Court said that the general character of the objection was fairly before the trial court, and that it was therefore proper to notice the alleged error.

In *Clyatt against the United States,* 197 U. S. 207, 49 L. Ed. 726 cited by counsel at the bottom of page 36 of his brief, the Supreme Court held that the omission from the bill of exceptions of the technical recital that it contains all the evidence should not deprive the defendant of full consideration of his guilt by preventing a determination by the Supreme Court of the sufficiency of the evidence to sustain the verdict.

These cases, however, do not conflict with the general rule made the law of this court by the case of *Shelp et al* vs. *United States* 81 Fed. 694, above cited.

IV.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN REFUSING TO ADMIT THE SELF-SERVING LETTER WRITTEN BY PLAINTIFF IN ERROR YORK TO HIS BROTHER, O. S. York.

The testimony of the witnesses Foster and Moffitt was not as to the contents of the letter from O. S.

York to plaintiff in error York, but was as to what plaintiff in error York and Karr respectively said was in the letter. The testimony therefore as to what was said in a conversation between the two defendants and the two officers, is entirely different from the question of what was in the letter or letters mentioned in such conversations. The plaintiffs in error should not be allowed to prove by O. S. York the contents of a letter written by him to plaintiff in error York, and thereby lay the basis of introducing a self-serving letter in answer thereto. Had the Government offered evidence of the contents of the first letter against the plaintiffs in error, the plaintiffs in error could properly introduce the reply, but not otherwise. It should be remembered that the United States Attorney objected from the beginning to the introduction of the contents of these letters. At the bottom of page 61 of the Transcript, it appears that Mr. Preston objected to testimony regarding this first letter. At page 88 of the Transcript he again objected to the admission of the letter from O. S. York to his brother, plaintiff in error York. At page 234 of the Transcript it appears that O. S. York was called not by the government, but by plaintiffs in error, and the matter of his conversation with Mr. Moffitt and the letters was taken up again. The United States Attorney objected again on the ground that this was a collateral matter and had nothing to do with the case. But the Court, as appears on page 235 of the Transcript, overruled his objection by interrupting, and said that the witness O. S. York could

state the contents of the first letter, the letter having been destroyed.

Proof of the contents of this letter was obviously offered, and erroneously admitted over the objection of the prosecuting attorney for the sole purpose of laying the foundation for the introduction of his self-serving letter written in reply. The Government at no place undertook to prove the contents of the first letter, and if the defendants hurt their case by proving it, they should not be, and are not, in the same position they would be in if the Government had offered and proved the contents of the first letter.

The rule quoted by counsel for plaintiffs in error at pages 54 and 55 of his brief from 12 *Cyc.* p. 427, which is the law, is,

> "When statements constituting admissions, are received against defendant, he may prove his self-serving statements in connection therewith by reason of the rule admitting the whole conversation. Thus where the prosecution proves that the witness charged the accused with a crime, the accused has a right to prove that he denied the accusation. But the accused cannot prove in explanation, self-serving declarations contained in *other conversations.*"

This does not mean, however, that because the government brought out conversations between Foster and York and Moffitt and Karr, in which conversations York told Foster that he got a letter from his brother and answered it, and Karr told Moffitt that

York got a letter from his brother and answered it, these two letters are admissible as a part of those conversations. Applying the rule quoted above, the two letters amount to *"other conversations."* The prosecution did not prove, nor undertake to prove, the contents of either. Plaintiffs in error should not have been permitted to prove either. It is where the prosecution puts in evidence an accusatory letter that the defendant can prove the self-serving reply, and that is as far as the cases cited by counsel for plaintiffs in error, go.

The case of *Crawford* vs. *United States,* 212 U. S. 183; 53 L. Ed. 465, cited at the bottom of page 39 of the brief of plaintiffs in error, in giving the reason for the rule, says at the bottom of page 199, (L. Ed. p 472):

> "It is plain that the letter from the witness Aspinwall to the defendant, making the charge that defendant took the letters, as above stated, was put in evidence by the government for the purpose of endeavoring to show that the defendant had surreptitiously taken evidence which might possibly be used against him upon his trial. The response of defendant to such letter should have been admitted as explanatory of the letter of accusation."

If this court should uphold the contention of plaintiffs in error on this point, it would encourage counsel for the accused to get into the record, without disclosing its purpose, an accusation against

the accused to be made the basis of the introduction of volumes of denial. Such practice is not consonant with the reason of the general rule which admits all of the correspondence, if part of it is admitted, nor is it consonant with fair play and good morals.

V.

NO PREJUDICIAL ERROR WAS COMMITTED IN PERMITTING THE JURORS TO EXAMINE THE SQUARE BLOCK OF IRON NOT IN EVIDENCE, AND IF ERROR WAS COMMITTED, IT WAS WAIVED AT THE TIME BY THE FAILURE OF COUNSEL FOR PLAINTIFFS IN ERROR TO MAKE A PROPER OBJECTION AND RESERVE AN EXCEPTION, AND WAS CURED BY THE INSTRUCTION OF THE COURT TO DISREGARD ANY MATTERS WHICH WERE NOT ACTUALLY ADMITTED IN EVIDENCE.

At the outset, counsel for the Government desire to correct a misquotation of the Transcript which appears at pages 78, 79 and 80 of the brief of plaintiffs in error. A reading of page 79 would lead your Honors to believe that the quotation from the Transcript is consecutive, and that nothing is omitted. However, there is a material part of the Transcript omitted immediately following the words "I don't know what" a little below the

middle of page 79 of the brief. The omitted portion as appears by an examination of the Transcript at page 288 et seq., is as follows:

> "Mr. Woodworth. Q. Could you say yourself, Professor, whether or not gold heated to the necessary degree for the purpose of becoming a molten mass placed in here would not stick in this ring?
>
> A. I would not want to qualify as an expert in the casting of gold on metals, having had but little experience with that outside of the casting of bullion.
>
> Mr. Preston. Put your finger upon that stuff and see if you can give us an opinion upon that."

The omission, it should be observed, if not corrected, would lead to two errors—

1st, It would lead the Court to believe that counsel for plaintiffs in error, Mr. Woodworth, did not himself ask any questions of the witness directed to his own purpose, with regard to the square block of iron, and

2nd, It would lead the Court to believe that the objection and exception quoted at the top of page 80 of the brief of plaintiffs in error, were taken to the square block of iron and the testimony concerning it.

The fact is, that counsel did not make any legal objection to the block of iron, nor any questions

regarding it, nor give the Court occasion to make any ruling with regard to any objection thereto, consequently, no exception was taken with regard to the iron or any question asked about it, although as appears from the record, everything said or done with regard to that block of iron was said and done in open court, before counsel for plaintiffs in error, and he himself, as appears at the middle of page 288 of the Transcript, asked a question concerning it in the interest of his clients. The objection, ruling and exception quoted at the top of page 80 of counsel's brief, all referred to another matter, being a little box of lime which, as the record shows, some of the Government's witnesses thought to be plaster of paris, and concerning which no point is made before this Court.

An examination of the square block of iron which is in the record here, will, I think, convince this court that its presence in court and before the jury, did not constitute prejudicial error.

Furthermore, counsel for plaintiffs in error know that the block of iron, box of lime, and various other articles, were offered in evidence immediately after the testimony quoted by him at pages 78, 79, and 80 of his brief, and his objection thereto was sustained as appears at page 474 of the reporter's notes, and which proceeding, was for some reason, left out of the proposed Bill of Exceptions of plaintiffs in error, and escaped the notice of counsel for the defendant in error.

All of these articles should have been admitted in evidence for they had been made the subject of interrogatories equally on behalf of the Government and the plaintiffs in error.

In all of the cases cited by counsel for plaintiffs in error on this point which I have examined, the observations and experiments by the jurors which were held to be prejudicial and grounds for reversal, were made not in open court with all parties present, but in the jury room or on the outside. The trial judge therefore did not have the opportunity of seeing, as he did here, just what was done, nor did the defendant or his counsel have the opportunity of making a proper objection at the time. On that account the trial court in passing on the motion for new trial based on such irregularity, was not in a position to determine whether harm was done or not. Furthermore, when the case came to the reviewing court, the attitude of the defendant and his counsel at the time of the alleged irregularity, was not an element to be considered for the reason that neither was present when the irregularity occurred.

Here we have a different case. A careful reading of the transcript from near the bottom of page 286 to the middle of page 289 discloses that counsel for plaintiffs in error did not make any objection to the square block of iron, or anything that was done with regard to it, upon which the court could base

a ruling, and that no ruling was made by the Court, or exception taken thereto by counsel.

Upon the arguments hereinbefore set forth under paragraph III, the Government sumbits that this point is not properly before this court for review.

Furthermore, if there was any error in what transpired with regard to the block of iron, it was cured by the instruction of the court which appears near the bottom of page 312 of the Transcript, and which is as follows:

> "You are not to consider any testimony or exhibits or matters or things exhibited to you during the trial, unless the same were admitted in evidence by the Court and you are not permitted to allow yourselves to be influenced by anything in this case outside of the testimony, evidence and exhibits which have been actually admitted, and are in evidence. In other words, you must try this case and determine the guilt or innocence of these defendants solely and exclusively upon the testimony, evidence and exhibits introduced in this case, and nothing outside of that."

VI.

THERE WAS NO ERROR IN PERMITTING EVIDENCE TO GO TO THE JURY OF AN ATTEMPTED PASSING OF A $5 COUNTERFEIT GOLD COIN BY THE PLAINTIFF IN ERROR YORK ON DAVID M. BOYLE SIX

MONTHS PRIOR TO THE DATE WHEN THE CONSPIRACY IS ALLEGED TO HAVE BEEN FORMED.

The law is too well settled to justify citation of authorities that other acts than those set up in the indictment, and which happened prior to the offense charged, can be proved to show intent or guilty knowledge, and that an act six months prior to the offense charged, is not too remote.

The trial judge correctly laid down the law and limited the effect of the testimony with regard to the attempted passing on David M. Boyle when on pages 52 and 53 of the Transcript, he said:

> "* * * but it is always competent, isn't it, in cases of this kind for the purpose of showing guilty knowledge, to show other contemporaneous acts or acts not too remote? I do not see any reason why a different rule would prevail. It is essential here for the government to show guilty knowledge on the part of these defendants in the passing of these various coins. * * * It might well be said that they would have to have these coins or have some knowledge where to get these coins, before they could conspire. But that is not the purpose of the admission of this testimony. It is simply to show, if it does show, that the latter acts were done with knowledge of the character of the coins. The objection will be overruled and the testimony limited to that purpose."

The testimony with regard to the articles found in the basement at 4405 West Street was likewise introduced, and properly so, for the purpose of showing intent and guilty knowledge with regard to the passing of the counterfeit coins.

VII.

NO ERROR WAS COMMITTED IN ADMITTING IN EVIDENCE THE TWENTY-SEVEN COUNTERFEIT FIVE DOLLAR COINS FOUND IN THE REAR OF LONGERS SALOON IN STOCKTON, CALIFORNIA, ON JULY 9TH, 1915.

The testimony of J. T. McKenzie appearing at pages 34, 39, and 40 of the Transcript, when taken in connection with the fact that York and Karr went to Stockton together, were seen together there, and that York was in the saloon when the attempt was made by Karr to pass the counterfeit $5 coin on Eickhoff, is amply sufficient to justify the admission in evidence of the twenty-seven counterfeit coins found in the flush box of the toilet in Longers' Saloon.

At the middle of page 34 of the Transcript, McKenzie said, referring to York,

> "Yes, I could see him all the way to the back of the saloon, to the entrance of the toilet."

At page 39, McKenzie testified that he saw York go into Longers' Saloon and at page 40 McKenzie

testified that the plaintiffs in error had told him that they noticed the fellows watching them and wanted to get out of the way.

It is a perfectly reasonable presumption that York who, according to the theory of the prosecution was carrying the stock of counterfeits, should want to get rid of them, after Karr had had trouble in passing one and parties were observed watching them. He went into the saloon to get rid of this damaging evidence, and he did so.

In view of the fact that a motion to view the premises is directed to the discretion of the trial judge, I do not think counsel is seriously urging his exception to the denial by the trial judge of the motion to view the premises at 4405 West Street, Oakland, which point is covered by paragraph VII of counsel's brief.

Paragraphs VIII and IX of counsel's brief were directed to the refusal of the trial court to give requested instructions numbers 8 and 27. The points therein are fully covered by the instructions given by the court, and there was no occasion for the instructions requested by counsel.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

M. A. THOMAS,
Asst. U. S. Attorney.

Attorneys for defendant in error.

No. 2892

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. W. MARSHALL, Trustee of the Estate of N. H. HICKMAN, Bankrupt,

Appellant,

vs.

ELIZABETH NEVINS,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the District Court of the United States for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For the Plaintiff:

LLOYD S. ACKERMAN, Esq., San Francisco.

For the Defendant:

W. F. SULLIVAN, Esq., San Francisco.

In the District Court of the United States, in and for the Northern District of California.

No. 15,986.

J. W. MARSHALL, Trustee of the Estate of N. H. HICKMAN, Bankrupt,

Plaintiff,

vs.

ELIZABETH NEVINS,

Defendant.

Praecipe for Transcript of Record for Use on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record to be used by plaintiff on appeal from the Judgment of the District Court of the United States, in and for the Northern District of California, rendered October 4, 1916, to the United States Circuit Court of Appeals.

You will please include in the transcript the following documents:

1. This Praecipe.
2. The Complaint.
3. The Answer.
4. Transcript of the Testimony Taken at the Trial.

5. Exhibits Introduced in Evidence by Plaintiff and Defendant.

6. Opinion and Order of the District Judge.

7. Judgment.

Dated October 25th, 1916.

LLOYD S. ACKERMAN,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 25, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

[Title of the Court and Cause.]

Complaint to Set Aside Preference.

Plaintiff complains and alleges:

I.

That the defendant is now and at all times hereinafter mentioned was a *femme sole.*

II.

That heretofore, to wit, on the 14th day of January, 1916, certain creditors filed in this court a petition in involuntary bankruptcy asking that N. H. Hickman be adjudged a bankrupt. That said petition was numbered 9858 on the files and records of the clerk of this court.

III.

That thereafter, to wit, on the 26th day of January, 1916, said N. H. Hickman filed in this court an answer to the said petition in bankruptcy admitting the commission of an act of bankruptcy under Section 3–A–2 of the Bankruptcy Act. That thereafter, to wit, on or about the 2d day of February,

*Page-number appearing at foot of page of original certified Transcript of Record.

1916, said N. H. Hickman was by this court duly adjudicated a bankrupt.

IV.

That heretofore, to wit, on the 23d day of February, 1916, the above-named plaintiff was appointed by the referee in bankruptcy trustee of the estate of the above-named bankrupt and directed to file a bond, and that the plaintiff has qualified as trustee of the estate of the above-named bankrupt, and is now, and ever since the 24th day of February, 1916, has been the duly qualified and acting trustee of the estate of the above-named bankrupt.

V.

That on the 7th day of December, 1915, and for a long [2] time prior thereto, N. H. Hickman was the owner of a 37/64 interest in a certain American schooner called "William Olsen" of the burden of 490 tons or thereabouts. That on said 7th day of December, 1915, and for more than one year prior thereto, the said N. H. Hickman was insolvent. That on the said 7th day of December, 1915, the said N. H. Hickman being then and there insolvent, sold, assigned, transferred and delivered to the above-named defendant a 73/128 interest in said schooner "William Olsen" and said transfer was recorded in the custom office of the United States in the City and County of San Francisco. That the said N. H. Hickman in his answer filed in the said bankruptcy proceedings admitted under oath the transfer of said interest, to wit, a 73/128 interest in and to the schooner "William Olsen" while he was insolvent to the said defendant Elizabeth Nevins, with intent to

prefer said Elizabeth Nevins over his unsecured creditors.

VI.

That the said property transferred by the said Hickman to the defendant was such as his creditors had and have a right to have subjected to their claims. That said property is not exempt property under the provisions of the bankruptcy act.

VII.

That the said Hickman intended to and did under and by virtue of said transfer of said property to said defendant prefer the said defendant over his other unsecured creditors, and that the said defendant at the time said transfer was made had reasonable cause to believe that the enforcement of such transfer would effect a preference and also that said Hickman had a present intent to prefer her over his other unsecured creditors.

VIII.

That said defendant is the mother-in-law of the said N. H. Hickman. **[3]**

IX.

That at the time of the aforesaid transfer the said Hickman claims to have been indebted to the defendant in the sum of $8,600, and claims that the said indebtedness was incurred in 1912. That said N. H. Hickman in his schedule in bankruptcy filed in this court admits debts to the amount of $36,934.40 and assets of the value of $50.00. That the value of said "William Olsen" is the sum of $20,000; that demand has been made by the plaintiff upon the defendant to retransfer and redeliver to the plaintiff the afore-

said property so unlawfully transferred by the said N. H. Hickman to the defendant, but that defendant has and does fail, neglect and refuse to deliver to the trustee the said property or its value.

X.

That said schooner "William Olsen" is in active use and under charter and is earning and has earned since December 7th, 1915, and will continue to earn large sums of money.

WHEREFORE plaintiff prays that he may have judgment that the transfer of the aforesaid 73/128 interest in the schooner "William Olsen" by said N. H. Hickman to the defendant was an unlawful preference, and that said transfer be annulled and set aside, that the said defendant be directed to make, execute and deliver to the plaintiff a reconveyance or transfer of said 73/128 interest in said schooner "William Olsen"; that the said plaintiff have judgment against the said defendant for the value of said interest so unlawfully transferred and that the said defendant be required to account for the rents, issues and profits thereof from the 7th day of December, 1915, and that plaintiff have judgment for his costs herein incurred.

LLOYD S. ACKERMAN,
Attorney for Plaintiff.

(Duly verified.)

[Endorsed]: Filed Mar. 6, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [4]

[Title of the Court and Cause and Number.]

Answer.

Now comes defendant, Elizabeth Nevins, and answering complaint of plaintiff herein, admits, alleges and denies as follows:

I.

Admits the allegations contained in paragraph "I" of said complaint.

II.

Admits the allegations contained in paragraph "II" of said complaint.

III.

Admits the allegations contained in paragraph "III" of said complaint.

IV.

Admits the allegations contained in paragraph "IV" of said complaint.

V.

Answering paragraph "V" of said complaint defendant admits that on the 7th day of December, 1915, and for a long time prior thereto, N. H. Hickman was the owner of 37/64 interest in a certain American schooner called "William Olsen" of the burden of 490 tons or thereabouts. And further answering said paragraph "V" of said complaint this defendant says that she has no information or belief upon the matter as to whether the said N. H. Hickman was on the said 7th day of December, 1915, and for more than one year prior thereto or for any length of time or at all, had been insolvent and for

that reason and basing her denial on that ground this defendant denies that the said N. H. Hickman was on the said 7th day of December, 1915, and for more than one year prior thereto [5] or for any other length of time or at all had been insolvent and calls for proof thereof. And further answering said paragraph "V" of said complaint this defendant admits that said N. H. Hickman did on the said 7th day of December, 1915, sell, assign, transfer and deliver to this defendant a 73/128 interest in said schooner "William Olsen," and that said transfer was recorded in the custom-house of the United States, in the City and County of San Francisco, State of California.

VI.

Answering paragraph "VI" of said complaint this defendant denies that the said property transferred by the said Hickman to this defendant was such as his creditors have and had a right to have subjected to their claims. And further answering said paragraph "VI" of said complaint this defendant alleges that the said transfer of the said property by the said Hickman to this defendant was a good and valid transfer of said property for a good and valuable consideration paid and delivered to the said Hickman by this defendant for and in consideration of said transfer of the said property; and that the said property has not at any time since the said transfer on the said 7th day of December, 1915, by the said Hickman to the said defendant formed and does not now form any part of the property of the said N. H. Hickman, and that the said property is not in any

way subject to any of the provisions of the Bankruptcy Act of the United States, but that the said property so transferred by the said N. H. Hickman to this defendant is now and ever since the said transfer so made as aforesaid on the said 7th day of December, 1915, has been wholly and exclusively the property of this defendant and in her possession. And further answering said paragraph "VI" of said complaint this defendant says that on the said 7th day of December, 1915, or at any time prior thereto she **[6]** did not know nor had she any means of learning or discovering that the said N. H. Hickman on the said 7th day of December, 1915, was, or at any time prior thereto had been insolvent, if the fact were so.

VII.

Answering paragraph "VII" of said complaint this defendant says that she has no information or belief on the matters and things stated in said paragraph of said complaint sufficient to enable her to answer the same and for that reason and basing her denial on that ground this defendant denies that the said N. H. Hickman intended to and did under and by virtue of said transfer of said property to this defendant prefer this defendant over any other of his creditors; and further answering paragraph "VII" this defendant denies that at the time of said transfer so made she had reasonable or other cause to believe that the enforcement of such transfer would effect a preference and that the said Hickman had a present or any intent to prefer her over any other of his creditors.

VIII.

Admits the allegations contained in paragraph "VIII" of said complaint.

IX.

Answering unto paragraph "IX" of said complaint defendant admits that at the time of the transfer of the aforesaid property the said Hickman was indebted to the said defendant in the sum of $8,600. Admits that said Hickman in his schedule in bankruptcy filed in this court admitted debts to the amount of $26,934.40 and assets of the value of $50. Admits that demand has been made by the plaintiff upon the defendant to transfer and deliver to the plaintiff the aforesaid property transferred by the said Hickman to the defendant, and that defendant has and does fail, neglect and refuse to deliver to the trustee the said property or its value; but denies that the value of the said schooner "William Olsen" is [7] or was, at the time of the said transfer by the said Hickman to the said defendant, the sum of $20,000, or that the value of the said schooner "William Olsen" was or ever has been greater than the sum of $15,000.

WHEREFORE, defendant prays to be dismissed hence with costs.

W. F. SULLIVAN,
Deft's Atty.

(Duly verified.)

Service by copy of the within Answer hereby admitted this 27th day of April, 1916.

LLOYD S. ACKERMAN,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 27, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [8]

[Title of the Court and Cause and Number.]

Testimony Taken in Open Court.

Friday, June 30th, 1916.

Counsel Appearing:

For the Plaintiff: LLOYD S. ACKERMAN, Esq.

For the Defendant: W. F. SULLIVAN, Esq., and H. C. LUCAS, Esq.

Mr. ACKERMAN.—If the Court please, this is an action by J. W. Marshall as trustee of the estate of N. H. Hickman, a bankrupt, vs. Elizabeth E. Nevins, to set aside a preference. The complaint alleges that on the 14th day of January, 1916, a petition for involuntary bankruptcy against Hickman was filed, and thereafter, on the 26th day of January, 1916, Hickman filed an answer admitting the commission of an act of bankruptcy, and on the 2d day of February, was duly adjudged a bankrupt. On the 23d day of February the plaintiff in this case appointed by the referee trustee of the estate, and directed to file a bond, and ever since the 24th day of February has been the duly qualified and acting trustee of the bankrupt.

On December 7, 1915, Mr. Hickman was at that time fee owner of a certain interest, 37 sixty-fourths of the steamer called the "William Olsen"; that on that day, and for more than a [9] year prior to December 7th Hickman had been insolvent. On this last-named day, Hickman sold, assigned and

transferred a 73 one-hundred and twenty-eighth interest in the schooner "William Olsen" to the defendant, Mrs. Elizabeth Nevins, who was his mother-in-law. Hickman admitted under the transfer of the 73d one hundred and twenty-eighth of the schooner "William Olsen" with the intent to prefer her over his other creditors. And then and there are the various formal allegations that the property was such as his creditors had a right to have subjected to their claims; that the intent was on behalf of Hickman, to prefer Mrs. Nevins over the other creditors; that the effect was to create a preference, and that Hickman had a present intent to prefer her. That at the time of the transfer Hickman claims to have been indebted in the sum of $8,600, to the defendant and claims the indebtedness was incurred in 1912. Hickman in his schedule in bankruptcy admits debts to the amount of $36,934, and assets to the value of $50. That the value of the schooner "William Olsen" is the sum of $20,000; that demand has been made by the plaintiff upon the defendant for a redelivery, and that the defendant has refused. It is alleged that the "William Olsen" is now in active use, under charter, and earning considerable profits, and has been during the past year. The gravamen of the action is that portion of the provision of the bankruptcy act which provides that if the defendant in a case knows or has reasonable cause to believe that at the time the transfer was made by the bankrupt to her, that he was insolvent, that that was a transfer which the bankrupt acts voids and makes null; that there are a number of circumstances in-

dicating a knowledge upon the part of the defendant that Hickman was insolvent at the time of the transfer; but in the nature of things that cannot be shown that the defendant had actual knowledge, as that word would come from her own lips. We expect to prove that Hickman has been insolvent for a number of years; **[10]** that he was in close relationship with his mother-in-law, and she had every reason to suspect that he was insolvent, and unable to pay his debts.

Testimony of Charles B. Blessing, for Plaintiff.

CHARLES B. BLESSING, called for the plaintiff, sworn.

Mr. LUCAS.—At this time, if the Court please, I will state that of the four elements which go to make up a preference in matters of this kind, three of the elements are practically admitted. We admit that the defendant has been insolvent and was insolvent at the time he made the transfer. We admit that the transaction was made within four months; we admit that the effect of the transfer must have been to give the creditor a greater percentage than that accrued to other creditors, but we deny that there existed at the time of the transfer a reasonable or other cause for belief on the part of the defendant, Mrs. Nevins, that the transfer was made while the defendant was insolvent, or was made for the purpose of giving her a preference over other creditors. Our defense will be that she was not handling, or knew anything about his business transactions, or had any information or belief that he was in financial embarrassment at the time.

(Testimony of Charles B. Blessing.)

Mr. ACKERMAN.—Q. Mr. Blessing, you are a resident of the City and County of San Francisco?

A. Yes, sir.

Q. Have you been appointed trustee in bankruptcy of the Bay Shore Drayage Company?

A. Yes, sir.

Q. You were summoned here to bring with you the books of the Bay Shore Drayage Company. Did you bring them? A. I did.

Q. I show you what purports to be a minute-book, and ask you if that is the minute-book of the corporation, which was delivered [11] to you by the corporation officers? A. Yes, sir.

Mr. LUCAS.—(Intg.) What is the purpose of it?

Mr. ACKERMAN.—I am going to ask counsel that he permit the introduction of this in evidence, and we will connect it up later, I ask that it be marked.

(The book is marked "Plaintiff's Exhibit No. 1."

Testimony of Milton H. Hickman, for Plaintiff.

MILTON H. HICKMAN, called for the plaintiff, sworn.

Mr. ACKERMAN.—Q. You reside in San Francisco? A. Yes, sir.

Q. How long have you resided here?

A. Since 1890.

Q. When were you married?

A. On October 5, 1897.

Q. You married Theresa Nevine, did you not?

(Testimony of Milton H. Hickman.)

A. Yes, sir.

Q. She is the daughter of Elizabeth Nevine, the defendant in this case? A. Yes, sir.

Q. Since you married, you have resided in San Francisco? A. Yes, sir.

Q. Where does your mother-in-law, the defendant in this case, reside? A. Since I was married?

Q. Yes.

A. She lived in Vallejo at the time of the marriage, I think it was about 7 or 8 years ago—she had two children, and she divided her time between her son and her daughter.

Q. The daughter resided in San Francisco and the son in Vallejo? A. Yes, sir.

Q. What business have you been in during the last few years?

A. The lumber business—lumber business and shipping business.

Q. Were you president and chief stockholder of the Bay Shore Drayage Company?

A. I was president; I was not chief stockholder.

Q. Who was the chief stockholder?

A. T. C. Hickman.

Q. That is your wife? A. Yes, sir.

Q. You were manager of the Bay Shore Drayage Company, were you not? [12]

A. Yes, sir, president and manager.

Q. For how long were you president and manager?

A. Since, I think, the 21st day of May, 1909.

Q. Did that company continue in business until

(Testimony of Milton H. Hickman.)

the day of its bankruptcy, sometime in 1915?

A. Yes, sir; I was president before that, when the company was formed.

Q. The Bay Shore Drayage Company, was it or was it not a profitable business venture?

A. It was not profitable since 1912. It has been profitable.

Q. Since the date of your incumbency as president and general manager of that company, had it ever paid a dividend?

A. Since the time I took it, it paid one dividend.

Q. Since when? A. I think that was in 1905.

Q. That was prior to the time you became manager; I mean subsequent.

A. No, sir; I never had a dollar out of it.

Q. Did you receive a salary as president and general manager? A. Yes, sir.

Q. How much salary did you receive?

A. $125 a month.

Q. Were you paid that salary regularly?

A. Yes, sir,—not all of the time.

Q. There were times when the corporation was in such financial straits that they were not able to pay you your salary?

A. I left it to my creditors.

Q. At the time of the bankruptcy you had a considerable account against the corporation, did you not? A. Yes, sir.

Q. For salary and so forth? A. Yes, sir.

Q. Since 1909 were you engaged in any other business besides the Bay Shore Drayage Company?

(Testimony of Milton H. Hickman.)

A. Yes, sir, I was in the warehouse business.

Q. What company?

A. The Metropolitan Company.

Q. When did you go into that business? [13]

A. I think it was in the fall of 1910, we first started.

Q. How long did that business continue?

A. It continued until I closed it up, I think it was in October, 1913.

Q. Why did you close it up?

A. Well, it was unprofitable, and it was cheaper to close it up than to lose any more money.

Q. Was that venture ever profitable?

A. No, sir; but I wanted to keep it alive, because I was on the lease.

Q. As guarantor? A. No, sir, as lessee.

Q. As lessee? A. Yes, sir.

Q. Were you caused to lose some money by your lease? A. Yes, sir.

Q. A considerable amount of money?

A. Yes, sir.

Q. How much? A. $10,300.

Q. When you lost that, at that time, had you made any settlement?

A. Myself, I lost—I paid $15,000 for my release.

Q. Again restricting you to the period from 1909 to date, were you in any other business besides the Bay Shore Drayage Company and the warehouse company?

Q. Yes, sir. Up to the present time, you mean?

(Testimony of Milton H. Hickman.)

Q. Yes. You may continue up to the date of December 7th, 1915.

A. You mean engaged in, or was interested in?

Q. Were you engaged in or interested in any other business?

A. Yes, sir, I was interested in the Pacific Aeroscope Company.

Q. In what capacity,—as a stockholder or officer, or what?

A. No, I had the company and had a concession, and subsequently turned it over to capital.

Q. Did you receive any stock in that company?

A. Yes, sir, but it was not a profitable stock; I never got a dollar out of it.

Q. Have you been in any business since 1909, that has been profitable? A. Yes, sir.

Q. Say which one.

A. I was engaged in the lumber business. [14]

Q. Tell us about that, please.

A. I sold lumber foreign, and had a state contract.

Q. When?

A. From the 21st of May, 1909, until, I think, it was in 1912, the last year.

Q. You say that was a profitable enterprise?

A. Yes, sir.

Q. How much money did you make out of that?

A. Well, the money that I made out of that, I increased the plant of the Bay Shore Drayage Company; I paid my debts that I had carried since the days of the fire.

Q. How much money did you make out of that?

(Testimony of Milton H. Hickman.)

A. How much money did I make out of it?

Q. How much money did you make out of the lumber business? A. I should say $50,000.

Q. Is that clear over expenses?

A. Yes, sir.

Q. You made out of the contract with the state?

A. I sold other lumber, too; that was not my chief business.

Q. You had that business from May 21st, 1909, to 1912? A. Yes, sir.

Q. For how long a time prior to the 7th day of January, 1915, had you been insolvent?

A. I should say,—oh, if my creditors had forced me, I would have been insolvent since 1906.

The COURT.—Q. You mean after the fire?

A. Yes, sir.

Mr. ACKERMAN.—Q. During the past few years you and your wife have been on friendly terms with your mother-in-law, haven't you?

A. Yes, sir.

Q. She has visited at your house from time to time? A. Yes, sir.

Q. With frequency, once a week, once in two weeks, or what?

A. She generally stayed for a period of days when she came; she would visit her son, the same way.

Q. Where have you resided during the past two years? A. Since I have been married?

Q. Yes.

A. I lived for a good many years at 1767 Page Street, I lived there. [15]

(Testimony of Milton H. Hickman.)

Q. In a flat or a house? A. In a house.

Q. Do you rent that house? A. No, sir.

Q. You own it? A. I do not own it.

Q. Your wife owns it? A. Yes, sir.

Q. Then you moved to Franklin Street?

A. No, sir, I moved twice—my wife has asthma. We moved until we could get a location that she did not suffer from with asthma.

Q. You lived on California Street, did you not?

A. No, I lived at Van Ness Avenue, and then I moved into the Hotel Majestic; then we moved to an apartment on the corner of Clay and Franklin Streets; then we moved to Ross Valley; the climate did not suit us so we came back here.

Q. During the past few years did you have any conversation with your mother-in-law in regard to business matters? A. No, sir.

Q. Never spoke to her about business matters?

A. No, sir.

Q. Never discussed with her your financial affairs? A. No, sir.

Q. Never told her how you were progressing in a material way?

A. I do not think I ever mentioned business except I think I might when I lost the Harbor contract, I might have mentioned it; I would have to go into the commercial business instead of the contract business as far as the teaming end was concerned.

Q. Did she ever ask you how you were getting on?

A. No, I do not think she ever did.

(Testimony of Milton H. Hickman.)

Q. Did you ever have any financial transactions with her?

A. Yes, sir, I have had financial transactions with her.

Q. State the nature of them.

A. That is to say, I borrowed money from her and paid it back.

Q. You say you borrowed money?

A. Borrowed money and paid it back and borrowed it again.

Q. On the 7th of December, 1915, you were indebted to Mrs. Nevins in the sum of $8,600?

A. Yes, sir. [16]

Q. What was the money owing for?

A. For borrowed money.

Q. Money that she loaned you? A. Yes, sir.

Q. When did you borrow it from her?

A. That covers a period from 1905 on.

Q. Do I understand that you attempted to merge the indebtedness from 1905 on into the shape of a promissory note?

A. No, sir, this $8,600 covers loans from the 15th of February, 1908, on.

Q. From February 15, 1908? A. Yes sir.

Q. Did you give her a note to cover that indebtedness?

A. Yes, sir,—what the indebtedness was on the 15th day of February, 1912; then I borrowed some more money subsequently.

Q. Did you borrow the subsequent money that you referred to in one amount? A. Yes, sir.

(Testimony of Milton H. Hickman.)

Q. How much did you borrow? A. $2,500.

Q. $2,503.03?

A. She gave me a check for $2,500, and I gave her a check, but I did not get the money.

Q. What was that money borrowed for?

A. All this money?

Q. No, the second amount, August 26th, 1912.

A. I borrowed that to give the girl $20.

Q. What girl?

A. The girl in the office; I paid a draft for $1875, the principal amount.

Q. What was that for?

A. That was a draft from the schooner "William Olsen," at that particular time.

Q. Was that for the purpose of purchasing an interest?

A. No sir; that was a master's draft, and I paid, I did not have the money in the bank, and I subsequently collected the money when the freight came in.

Q. This note of $6,100 which was referred to as of date February 15, 1912; you say that was a consolidation of previous indebtedness which you had incurred? A. Yes, sir. [17]

Q. In what amounts were those sums borrowed from the smallest amount to the largest amount?

A. I have a statement of it.

Q. Where is it?

A. I borrowed on February 15, $1,250.

Q. What was that for?

A. What did I do with that?

(Testimony of Milton H. Hickman.)

Q. I was in the plaster business; I was backing a fellow in the plaster business; I used the money for that. On the 21st I got $1,250 more, on the 21st of February.

Q. What was that used for?

A. The same thing.

Q. The next amount.

A. On October 17th, same year, I got $500 more.

Q. What did you use that for?

A. The same thing. On the 24th I got $2,500 more.

Q. For the same thing? A. Yes, sir.

Q. The next item.

A. On November 14th, 1908, I collected from Hickman & Masterson $409.60.

Q. Is that a credit?

A. Yes, sir, I credited her up with it.

Q. Did you pay it to her? A. No, sir.

Q. How do you figure it as a credit then?

A. In November, 1906, I paid her $8,600, in November, 1906.

Q. All right.

A. This $409.60 was the last payment; I had dissolved from the Hickman & Masterson copartnership; I had got out of the corporation; I had collected two amounts from them; that is part of the money of the drayage company and part of the book accounts; I collected $409.60 on November 14, 1908, and on December 29, I collected $1500.

Q. I do not understand why the amount of $409.60 appears as a credit and was not paid.

(Testimony of Milton H. Hickman.)

A. When I left the corporation of Hickman & Masterson Company, I assumed and took over the Bay Shore Drayage Company, I took over the Harbor Commission's contract. I assumed all the old indebtedness of Hickman & Masterson at the time of the fire, and gave him $6500 in cash to get my release. This $1500 I used to [18] get my release.

The COURT.—How did you charge that?

A. At that time there was $1500,—I was in the lumber business, I had a partner, we had an incorporation, and we called it the Bay Shore Company. When we burned up we were solvent, and afterwards we got an extension of time; we later on incorporated, and on October 1st, 1908, I left the company and that money that I owed my mother-in-law at that time, stood part to her credit in the drayage company and part on the books of the lumber company, and when I settled with them I got $409.60 from the lumber end and $1500 from the teaming end, when I left there. I asked permission to use that money and I used that money that year.

Q. Then you did not credit this $409.60 on that statement?

A. Yes, sir, I collected the money from her and put it in the bank.

Q. You actually used the money, did you not?

A. Yes, sir, later on.

Q. So that the item of $409.60 is not to be credited as against the sums which were due at that time, to Mrs. Nevins? A. Are not to be credited?

(Testimony of Milton H. Hickman.)

Q. On your account?

A. I collected it for her.

Q. You did not take credit?

A. No, I debited the bank.

Q. You owed her the money? A. Yes, sir.

Q. Give the next account after the $409.60.

A. *Thwas* on April 10, $34.40, for taxes. I gave her credit.

Q. Did she give you the money for those taxes?

A. Yes, sir, that was on April 4th, 1910.

Q. On July 21st?

A. On July 21st, 1910, I gave her credit for $125, that was an assessment on the schooner "William Olsen."

Q. Did she give you a check for that amount?

A. I do not remember whether she gave me a check or not; I debited her—no, sir, she did not give me a check; she gave me a [19] check on December 18th, 1909—not a check, but the coin. I am merely giving you the credits.

Q. I want to find out the items that she paid you money on, and the amounts. The last item you gave was $409.60? A. Yes, sir; December 29, $1,500.

Q. What year?

A. 1908. November 14th, 1908, $409.60.

Q. Go on.

A. April 14, 1910, $34.40 for taxes. July 21st, I have it here, $125.

Q. I understand you to say that she did not give you the money to pay; did she give you the money

(Testimony of Milton H. Hickman.)

for that $125 to pay the assessment on the "William Olsen"?

A. Yes, sir, $125; that is right; no, on December 18, 1909, I paid $125. I have her *charged that* on account of the "Olsen" and on the 21st of July, 1910, I collected it back, as I had it charged her, that $125, in December, 1909; I gave her credit for that money on July 21st, 1910. October 31st, 1910, for taxes, $70.

Q. Did she give you the money for that?

A. Yes, sir. On February 15, 1912, I gave her credit for $968.96, interest.

Q. At what rate? A. At 5 per cent.

Q. From what date?

A. Covering all the other debits given here.

Q. You gave her interest by credit covering 5% on the amounts from the time they were borrowed until that time. Is that correct?

A. Yes, sir; the notes originally were 7%, but Mr. Greenwald was only charging me 5%, and I only give her 5%.

Q. On February 16, 1912, that indebtedness was merged into a note for the sum of $6,100?

A. Yes, sir.

Q. Did you pay interest on that note?

A. The 6100-dollar note?

Q. Yes.

A. No; pardon me, you are mistaken; that is the total amount of the advances, $6,607.96.

Q. Why did you give her a note for $6,100?

A. Because I have her charged, on November 30,

(Testimony of Milton H. Hickman.)

1908, the taxes on the Page Street property, $32.68, and on July 2d, 1909, I paid [20] for the McEnerney Act $25, and notary fees, 50 cents—

Q. What do you mean, "you have her charged"? Do you mean you borrowed the money from her and paid that, or you charge her account?

A. Her property adjoins my wife's and we cleared it through the McEnerney Act so as to save the expense, but I paid the entire bill, and paid her.

Q. You took credit for the sum between $6,607.96 and the sum of $6,100?

A. I disbursed this money.

Q. You took credit for it?

A. I charged it to her and took credit for it.

Q. The note of $6,100 bore interest at what rate?

A. At the rate of 5%.

Q. From the date that note was made, did you pay interest on it, on the note of $6,100, at the rate of 5% per annum? A. When I credited this interest.

The COURT.—Q. After the time you gave this note for $6,100, did you pay your mother-in-law any interest? A. No, sir.

Mr. ACKERMAN.—Q. She gave you a check on August 26, 1912, for $2,500? A. Yes, sir.

Q. Did you pay interest on that? A. No, sir.

Q. Was the Bay Shore Drayage Company indebted to Mrs. Nevins? A. Yes sir.

Q. For how much?

A. There was a note of $2,100, a balance of $2,100; then there was some other moneys.

Q. Do you remember when they were borrowed?

(Testimony of Milton H. Hickman.)

A. No, sir; they were entered up by the quarter.

Q. Were they borrowed in a lump sum or in small amounts?

A. Notes that I had collected and set to her credit, and they [21] credited it; one small amount of $600, I think it totaled.

Q. I am going to ask you how you reconcile the statement you made a while ago that you never discussed with Mrs. Nevins any financial matters and the statement that you have just testified to that you have borrowed on various occasions from her considerable sums of money?

A. I never asked her for a dollar in my life.

Q. How did you get it? A. I spoke to my wife.

Q. You spoke to your wife? A. Yes, sir.

Q. Did she ever ask you why you did not pay interest on this indebtedness?

A. No, sir; I did pay her lots of interest.

Q. By credit?

A. No, sir. I paid her in this balance of $409.60; I paid her interest from 1905 to 1909.

Q. So you began your financial transactions with Mrs. Nevins in 1905. Is that correct?

A. I think it was in 1905.

Q. At various times during the past few years you had been, I believe, so embarrassed for ready money that you were compelled to borrow for almost the necessities of life? A. No, sir.

Q. Have there not been times when you could not pay your rent when it became due?

A. I had no rent to pay.

(Testimony of Milt[illegible]H. Hickman.)

Q. You testified that you moved from the family residence on Page Street to Franklin Street and then to the Majestic Hotel; why do you say you had no rent to pay?

A. My home was rented, that money was coming in; that offset the other.

Q. How much did you get for it? A. $45.

Q. You mean to say that you paid your bill at the Majestic Hotel with that? A. No, sir. [22]

Q. I am asking you if you were not so embarrassed that you did not have the money to pay for the necessities of life, which includes your board and lodging?

A. No, sir, I was never embarrassed until after the 24th day of January, 1915.

Q. You never stated to anyone that you required money to pay your rent and for the necessities of life?

A. Yes, sir; I might have said that I required that because I was, from March, 1915, up to the end of 1915, I was devoting my exclusive time to the Bay Shore Drayage Company, and I was doing that work without drawing pay.

Q. Have you ever been sued? A. Yes, sir.

Q. Take your memory or recollection back to 1909, and tell me whether or not you were sued during 1909? A. Yes, sir, I was sued in 1909.

Q. By whom?

A. Charles Nelson; we were fighting over a stencil crate, the ownership of it. He got a judgment of $56; I paid it to him before he left.

(Testimony of Milton H. Hick n,)

Q. In 1910 were you sued? A. No, sir.

Q. In 1911? A. I don't think so, no, sir.

Q. In 1912?

A. I don't think I was sued until 1914.

Q. When in 1914 and by whom, and for what?

A. I was sued by the Albion Lumber Company.

Q. What for? A. I think for $1200.

Q. Did they get a judgment?

A. Yes, sir, I did not fight it.

Q. It went by default?

A. Yes, sir, I admitted it.

Q. They got judgment in 1914?

A. I think it was in 1914.

Q. Did you pay the judgment?

A. I gave them security.

Q. You gave them security in the Pacific Aeroscope Company? [23] A. Yes, sir.

Q. Have you paid this judgment? A. No, sir.

Q. Is the stock of any value whatever at the present time? A. No, sir.

Q. Did they dismiss the judgment of record upon obtaining that security?

A. They agreed to dismiss the judgment.

Q. If they got the money from the stock?

A. Yes, sir.

Q. The judgment was unsatisfied of record. Is that correct? A. I think so.

Q. Who else sued you?

A. I think that was the only one.

Q. Were there any justice court suits?

A. In 1914, no, sir.

(Testimony of Milton H. Hickman,)

Q. Any time prior to December 7th, 1914?

Mr. LUCAS.—That is objected to as irrelevant, incompetent and immaterial.

The COURT.—It probably would be unless knowledge of the fact were brought home to Mrs. Nevins. I assume that you are going to connect the defendant with knowledge; otherwise it is immaterial.

Mr. ACKERMAN.—I do not propose to connect up the defendant in this case with knowledge of these matters otherwise than indirectly; I cannot do it, because I have no means to prove that the defendant in this case had actual knowledge of these matters other than the circumstances offered. I take it to be the law that there is a public record showing an unsatisfied judgment against this man, and if I prove his general reputation was that he was insolvent, and that on various occasions he had borrowed money, and did not pay the interest or principal, I take it that such circumstances would induce a prudent and reasonable person to believe that Hickman was insolvent all during this period. She is charged with the same standard of conduct that is [24] applicable to business men. It so happened that he borrowed this money from his mother-in-law.

The COURT.—The mother-in-law may not have investigated the financial standing of the son-in-law with the same critical eye that a business man or bank would.

Mr. ACKERMAN.—Under the law she is charged with the same degree of prudence and skill in her

(Testimony of Milton H. Hickman,)

affairs as a bank or business man would be; that is the situation in this case, that instead of borrowing from the brother-in-law, he borrowed it from the mother-in-law. The creditors cannot be produced. I am prepared to submit authorities on that point.

Mr. LUCAS.—I submit that the objection is well taken unless he can bring notice of the fact home to the defendant.

Mr. ACKERMAN.—Q. You were going to tell us about justice court suits?

A. I was managing owner of the bark "Lurline."

Q. State who brought suits against you, and if the judgments were paid?

A. No, they were not all paid; part were paid and part were not paid.

Q. How many were not paid?

A. I think there was liability insurance brought against me on account of the bark "Lurline," that was unpaid.

Q. When was that judgment recovered?

A. When was it obtained?

Q. Yes, sir.

A. Somewheres in June, 1914, and 1915; somewheres along there.

Q. On the occasion when you borrowed this money from Mrs. Nevins, do you contend that you never discussed those financial affairs, nor did you make any direct demand upon her for the money?

A. No, sir.

(Testimony of Milton H. Hickman,)

Q. In each case you went to your wife and asked her to get the money?

A. I went to her and asked her to ask my mother-in-law.

Q. You would receive the money and you would have to make no **[25]** explanations?

A. No, sir.

Cross-examination.

Mr. LUCAS.—Q. I show you a check bearing date February 15, 1908, signed Lizzie Nevins, payable to M. H. Hickman. Tell me what that check is?

A. That check is dated February 15, 1908, marked No. 2, drawn on the German Savings & Loan Society for $1250, payable to the order of N. H. Hickman, signed Lizzie Nevins.

Q. Did you receive that money?

A. Yes, sir, I collected it from the bank.

Q. That is one of the sums of $1250 that you testified to already? A. Yes, sir. I got the account.

Q. That is Mrs. Nevins' signature?

A. Yes, sir.

Mr. ACKERMAN.—Do I understand, Mr. Lucas, that it is your intention to offer entries in support of the items that he has testified to?

Mr. LUCAS.—Not all of them. There may be some question in your mind that he ever did get this money. I want to show, as a matter of fact, that Mr. Hickman did get the sums of money.

Mr. ACKERMAN.—I object to it on the ground that the showing of one or two or three entries is not material.

(Testimony of Milton H. Hickman,)

The COURT.—This is your witness. He has testified to certain notes. Counsel offers the *nots* in support of that. The objection is overruled.

Mr. LUCAS.—I offer these in evidence.

(The papers are marked Defendant's Exhibit "A.")

Mr. LUCAS.—Q. Kindly state what that check is (showing).

A. That is a check dated February 21, 1908, Number 3, German Savings & Loan Society. Pay to the order of Hickman, $1250, sign—Lizzie Nevins.

Q. Did you receive the amount of money mentioned in that check? **[26]** A. Yes, sir.

Q. You cashed the check? A. Yes, sir.

Q. Is that sum of $1250 the second sum you spoke of as having received from Mrs. Nevins?

A. Yes, sir.

Mr. ACKERMAN.—I would like to know, is it your position in this case that the money alleged to have been paid by the defendant—

Mr. LUCAS.—It is conceded that on December 7, 1915,—it is admitted that on December 7, 1915, Mr. Hickman, the witness, was indebted to Mrs. Nevins, the defendant in this action, in the sum of $6100 and interest, on a promissory note bearing date February 15, 1912, and upon the further sum of $2500, borrowed by the witness from the defendant on August 26, 1912, and that no interest upon either had ever been paid by the witness to the defendant.

Mr. ACKERMAN.—It is so stipulated.

(Testimony of Milton H. Hickman,)

Mr. LUCAS.—Q. How long have you known Mrs. Nevins? A. Since 1894.

Q. When were you married? A. In 1897.

Q. You knew her three years before you married her daughter? A. Yes, sir.

Q. Have you been familiar with Mrs. Nevins' business affairs for a number of years?

A. No, sir, I didn't have anything to do with her business affairs, except I paid some taxes on her property.

Q. How old is Mrs. Nevins?

A. I think she is 64.

Q. To whom was she married?

A. Her husband was James Nevins.

Q. What was his business?

A. He was on Mare Island. He died the year after we were married.

Q. Her husband always supported her?

A. Well, she had money of her own. Her father, my wife's grandfather, had some money.

Q. She inherited money from her father?

A. Her father had the Vallejo Ferry Company. [27]

Q. How large a sum of money did she inherit?

A. I don't know.

Q. Do you know what her income has been during the last five or six years?

Mr. ACKERMAN.—That is objected to as irrelevant, immaterial, incompetent and not cross-examination.

(Testimony of Milton H. Hickman,)

A. I don't know anything about her business affairs.

Mr. ACKERMAN.—I ask that the answer go out.

The COURT.—He says that he does not know. Let it go out.

Mr. LUCAS.—Q. During your direct testimony you testified that since the marriage of Mrs. Nevins' son she has visited back and forth between your home and the son's home. Is that correct?

A. Yes, sir.

Q. While she was visiting at your home, how often would you see her?

A. I would see her generally at the dinner table, in the evening.

Q. Are you in the habit of discussing your business affairs with your wife when you are at home nights?

A. No, sir, I never discuss anything at home.

Q. Did you ever discuss any business at all with your wife in the presence of Mrs. Nevins?

A. No, sir.

Q. During the last six or seven years that Mrs. Nevins has been visiting back and forth and visiting at your house, has your mode of living changed in any way? A. No, sir.

Q. Did Mrs. Nevins ever pay any of the household debts, did you ever ask her to pay any debts, or your wife's?

A. No, sir, except I think it was February 15, 1916, after I was insolvent, I believe she paid the house rent. The man came to the door and she gave

(Testimony of Milton H. Hickman,)

him the money. I was not present and never asked her, but she paid it.

Q. Is Mrs. Nevins acquainted with any of your business associates? [28]

A. No, sir, except Mr. Kern.

Q. She never had any discussions that you know of with Mr. Kern about business? A. No, sir.

Q. When judgments were gotten against you, as have been testified here, did you come home and tell her about it? A. No, sir.

Q. In other words, you kept your business affairs strictly to yourself, is that the truth of it, Mr. Hickman? A. Yes, sir.

Q. Did any creditors come to the door and Mrs. Nevins go to the door?

A. No, sir, they always came to the office.

Q. You supported your family in ordinary good style, didn't you? A. Yes, sir.

Redirect Examination.

Mr. ACKERMAN.—I understand you to say in answer to a question by counsel that you never discussed business matters at home. Is that correct?

A. No, sir, never discussed them.

Q. Never discussed them with Mrs. Nevins or Mrs. Hickman? A. No, sir.

Q. How did you proceed to get Mrs. Hickman to go to your mother-in-law to obtain the money that you borrowed from Mrs. Nevins?

A. That was in the privacy of my own room.

Q. You did discuss it in the privacy of your own room?

(Testimony of Milton H. Hickman,)

A. Yes, certainly, in that way. These various moneys that I got from her, I went to my wife and asked her to ask her mother.

Mr. LUCAS.—Q. Do I understand you that you never discussed your business generally with your wife?

A. No, sir, I never told my wife I lost a dollar.

Q. But when you wanted money to put in some special business you asked your wife concerning it?

A. Yes, sir. **[29]**

Testimony of O. H. Greenwald, for Plaintiff.

O. H. GREENWALD, called for the plaintiff. Sworn.

Mr. ACKERMAN.—Q. Mr. Greenwald, you reside in San Francisco? A. Yes, sir.

Q. For how many years have you resided here?

A. 50.

Q. Are you acquainted with N. H. Hickman?

A. Yes, sir.

Q. For how long have you known him?

A. Approximately 26 years.

Q. During that time, have you had business relations with him? A. Yes, sir.

Q. During all of that time? A. More or less.

Q. Commencing about the time of your first acquaintance with him?

A. Yes, sir, he was in my employ, when I first knew him.

Q. Will you give, Mr. Greenwald, a brief history of your business relations with Mr. Hickman?

(Testimony of O. H. Greenwald.)

Mr. LUCAS.—I object to that as immaterial.

Mr. ACKERMAN.—I am going to qualify the witness to testify to his general reputation as to solvency or insolvency.

Mr. LUCAS.—It is admitted here that he is insolvent, unless his general reputation is brought home to the defendant in this action, it is immaterial.

The COURT.—Do you admit that his reputation was that of insolvency?

Mr. ACKERMAN.—Will you admit, Mr. Lucas, that this witness is qualified to testify as to his general reputation as to solvency or insolvency.

The WITNESS.—I first got acquainted with Mr. Hickman by looking for a clerk in my office when I was in the lumber business; I think that was in 1890. He was in my employ for a number of years after that, until about up to 1896, approximately 1896; subsequently, another employee, a man by the name of Masterson, and Hickman were financed by myself to enter into the lumber business, succeeding, to a certain extent, the business of the Golden Gate Lumber Company, which was then dissolved. They [30] continued in that business until the time of the fire and earthquake in 1906. The fire was very disastrous; they lost a large stock of lumber, and after the fire were in a very bad way financially.

Q. What business did Mr. Hickman engage in next after that?

A. After that he got into the drayage business, in the Bay Shore Drayage Company. The business

(Testimony of O. H. Greenwald.)

of Hickman & Masterson was subsequently united in some way with a man by the name of Mickerson; I don't remember the name of the company, but they were mixed up with some company in the north; I cannot recall the name.

Q. Were you interested in the Bay Shore Drayage Company to any extent?

A. I was a creditor of the Bay Shore Drayage Company. I never had any stock in it; I loaned them in it; I loaned them.

Q. Do you know of your own knowledge whether the Bay Shore Company was a profitable concern at any time? A. Yes, sir, at one time they were.

Q. How long ago?

A. That was shortly after the fire, may be a year or so.

Q. Mr. Hickman owes you some money, does he not? A. Yes, sir.

Q. For how long has he owed you money?

A. Prior to the fire and earthquake of 1906; just how long I don't know.

Q. You have made frequent attempts since that time to collect your money?

A. Yes, sir, in various ways.

Q. During the time from 1906 up to the date of his insolvency, were you in close touch with Mr. Hickman's business affairs and business activities?

A. Yes, sir.

Q. Did you see him on occasions, or many times?

A. I used to see him periodically; that is to say, two or three times a week. I guaranteed a note for

(Testimony of O. H. Greenwald.)

him at the bank and had to hunt him up to meet it. He never came around; that is, when I say [31] "never," I mean unless I sent for him. Subsequently, in 1915, I saw him pretty nearly every day.

Q. Do you know what Mr. Hickman's general reputation in the community has been for the past five years for solvency or insolvency; answer "Yes" or "No." A. Yes, sir.

Q. What has been his reputation for solvency or insolvency in the community in which he lives?

A. His reputation is that he was insolvent.

Q. Have you discussed Mr. Hickman's reputation for solvency or insolvency with other persons from time to time? A. Yes, sir.

Q. Have you heard other persons speak of him?

A. Yes, sir.

Q. Did you ever hear anyone express an opinion regarding his solvency or insolvency?

A. I have heard people express the opinion that they would not give him credit.

Q. During 1915 you had some financial transaction with the Bay Shore Drayage Company, did you not?

A. Yes, sir.

Q. At that time you agreed to loan them money?

A. Yes, sir.

Q. Are you acquainted with Mrs. Nevins, the defendant in this action? A. Yes, sir.

Q. With Mrs. Nevins? A. Yes, sir.

Q. You testified that you had advanced money to the Bay Shore Drayage Company? A. Yes, sir.

Q. At that time you advanced that money, did you

(Testimony of O. H. Greenwald.)

have anything to do, directly or indirectly, with Mrs. Nevins, the defendant in this action?

A. Yes, sir.

Q. State what it was.

A. Mrs. Nevins had a claim against the drayage company for a note, an open account in the neighborhood of $2,800 or $3,000, and I offered to assist *Mrs.* Hickman in his drayage business provided *Mr.* Nevins and he would waive their claims until I was repaid for any advances made to the drayage company. **[32]**

Q. Did you enter into an agreement to that effect?

A. Yes, sir.

Q. To which Mrs Nevins was a party?

A. I had that proposition because I wanted Mrs. Nevins to be notified of the condition of affairs in that.

Q. I show you a paper which purports to be between you and the Bay Shore Drayage Company and ask you if you can identify that paper?

A. Yes, sir, I identify it.

Q. Do you know the signature attached to the agreement? A. Yes, sir.

Mr. ACKERMAN.—I offer it in evidence and ask that it be marked.

(The agreement is marked "Plaintiff's Agreement No. 2.")

Mr. LUCAS.—That is objected to upon the ground that it is immaterial, irrelevant and incompetent.

Mr. ACKERMAN.—It simply states that Mrs. Nevins agrees to defer collection in event of the

(Testimony of O. H. Greenwald.)

advances of certain money. It is evidence that charges Mrs. Nevins, the defendant in this case, with knowledge of the financial condition of Mr. Hickman, who was at the time manager and a general stockholder.

Mr. LUCAS.—Q. Did you ever meet Mrs. Nevins?

A. Yes, sir.

Q. When?

A. I remember very definitely meeting her at the Sausalito Ferry about 3 or 4 or 5 summers ago while Mr. Hickman and his wife and mother and brother-in-law were contemplating going across the bay.

Q. Did you discuss business with her?

A. Personally no, not directly.

Q. Did you discuss with Mrs. Nevins any of the circumstances leading up to the signing of that agreement? A. I did not.

Q. Do you know personally that she did sign it?

A. Yes, sir.

Q. Do you recognize her signature?

A. Yes, sir.

Q. Have you ever seen her signature before?

A. I have.

Q. You positively identify that as her signature?

A. I do.

Q. How do you know?

A. Because Mrs. Hickman signed her name to [33] that document as being a witness to that signature, and I have known Mrs. Hickman over 20 years, and I know she tells the truth.

Q. You yourself did not go or send anyone to dis-

(Testimony of O. H. Greenwald.)

cuss the signing of that agreement with Mrs. Nevins? A. Yes, sir.

Q. Who did you send? A. Mrs. Hickman.

Q. She was acting as your agent?

A. She was in my office before that agreement was signed, and the condition and circumstances were discussed.

Q. Mrs. Nevins was not present?

A. No, sir; that is why I asked Mrs. Hickman to witness the signature of Mrs. Nevins; because I was not present when Mrs. Nevins signed that paper.

Mr. ACKERMAN.—I offer it in evidence.

Mr. LUCAS.—I urge the same objection.

The COURT.—The objection is overruled.

(The document is marked "Plaintiff's Exhibit No. 2.")

Mr. ACKERMAN.—Q. At that conversation to which you have referred as having taken place between you and Mrs. Hickman, what was said in regard to this agreement, or anything else?

Mr. LUCAS.—That is objected to as hearsay.

Mr. ACKERMAN.—Q. Was anything said at that conversation about that agreement with reference to anything due Mrs. Nevins?

Mr. LUCAS.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. LUCAS.—Exception.

A. I wanted Mrs. Nevins to sign that agreement so that she could not have her claim paid before any advances made by me were paid off.

(Testimony of O. H. Greenwald.)

Mr. ACKERMAN.—Q. Did you ever ask Mrs. Nevins to guarantee any indebtedness to you of N. H. Hickman? A. Indirectly, yes, sir.

Q. What do you mean by "indirectly"?

A. I never had any conversation with Mrs. Nevins; I had a conversation with Mrs. [34] Hickman about it.

Q. What did you say to Mrs. Hickman?

A. I told Mrs. Hickman—

Mr. LUCAS.—That is objected to as hearsay, and I urge the same objection.

The COURT.—The objection is overruled.

Mr. LUCAS.—Exception.

A. (Continuing.) I told Mrs Hickman the conditions that existed; I told her that Mr. Hickman was indebted to me in certain sums, which I specified at the time, and told her that I wanted to have some settlement in this matter. That was on Thanksgiving Day, 1915; I went to her house with Mr. Hickman.

Q. You went to whose house?

A. Mrs. Hickman's house, on Thanksgiving Day, 1915, and took Mr. Hickman with me for the purpose of discussing this very thing. I wanted Mrs. Hickman to thoroughly understand the conditions about Mr. Hickman's advances, and I told her that I had advanced up to about $10,000 to the Bay Shore Drayage Company, this account that I guaranteed a note for him at the bank; that he owed certain other notes and that I thought I should have a preference. I told her I was through and was not

(Testimony of O. H. Greenwald.)

going to advance any more, and wanted some settlement with her. I told her that if Mrs. Nevins would guarantee the money that I advanced to him during 1915 and the note that I had guaranteed at the bank, that I would settle the matter of indebtedness with them for all time. She said they could not do it. I asked her whether they would turn over the schooner "William Olson" and let me manage for them, give them an account, and apply a reasonable amount to settle their indebtedness with me. She said no, I will not give up that ship, if we give that up we have got nothing left. So I said, "You let your mother guarantee the money and you keep the ship." We discussed this thing all over, and finally she said, "I will speak with my mother about [35] it and see what I can do"; so I left.

Q. Did Mrs. Hickman report to you a conversation with her mother about that settlement?

A. She did not personally; Mr. Hickman did.

Q. What did Mr. Hickman say?

A. A few days after that, the early part of the week, I asked Mr. Hickman what Mrs. Hickman had done concerning our conversation. He said, "Well, she has gone up to Vallejo."

Q. Who does he refer to when he says "she"?

A. Mrs. Hickman; Mr. Hickman spoke to his wife; that she was going to Vallejo that day to see what she could do about that. A few days afterwards I asked him what had been done. He got very vehement and very much excited, and flared up and pounded on the table and on the desk with his hand

(Testimony of O. H. Greenwald.)

and said, "You will never get that boat, you cannot have that boat," in a very vehement way. Subsequently I found out from the records that he had transferred it.

Q. You never received word from Mrs. Nevins other than this conversation you had with Mr. Hickman in which he said you would never get that boat; you did not get any other word?

A. No, that is the last I ever heard of it. I found out subsequently that the boat had been transferred on the 7th of December, I think it was.

Cross-examination.

Mr. LUCAS.—Q. How much money did Mr. Hickman owe you at the time of the fire?

A. I could not tell you that from memory.

Q. Well, roughly? A. I do not know. **[36]**

Q. Has any of that been paid?

A. I don't think so; I am not sure of it.

Q. Is it not true that he paid you everything that he owed you at the time of the fire?

A. I do not know; I cannot tell from my memory.

Q. How long has Mr. Hickman enjoyed the reputation of being bankrupt, that you have testified about?

Mr. ACKERMAN.—I object to the form of the question.

A. It has been a long time since he had no credit.

Mr. LUCAS.—Q. How long has Mr. Hickman had the reputation of not being able to pay his debts?

A. To my knowledge at least a year and a half or two years.

(Testimony of O. H. Greenwald.)

Q. But you have been doing business with him, have you not? A. Yes, sir.

Q. Now, I will show you a letter dated March 29th, 1914; is that your letter?

A. Yes, sir, that is my letter.

Mr. LUCAS.—I will offer it in evidence.

Mr. ACKERMAN.—No objection.

(The letter is marked Defendant's Exhibit "B.")

Mr. LUCAS.—Q. What does that letter refer to?

A. To the fact that Mr. Hickman should interest himself and some of my friends in the schooner "William Olson" on the basis, I think, of $12,000 for the entire valuation of the ship; and I had a subsequent offer of $15,000. I wanted to act decent with him. He had waived his option to purchase that by not meeting the deposit at the time it was due. In order to be decent and square with him I wrote him that letter and tried to tell him, to show him the facts.

Q. You sold him an interest in the "Olsen."

A. Yes; I could have sold it for $15,000. If he had been a stranger—he made a default on the cash payment—I could have sold the ship at a profit of 25 per cent more. [37]

Q. You got paid your money for that ship, did you not? A. Yes, sir.

Q. Do you know where he got the money?

A. Yes, sir.

Q. Where? Borrowed it.

Q. From whom?

A. He borrowed some from Mrs. Turner; he

(Testimony of O. H. Greenwald.)

borrowed some from the Healy-Tibbitts Construction Company.

Q. Do you know where *Mrs.* Hickman was expecting to get the money with which to repay his loan to Mr. Healy? A. No. sir.

Q. Had he made any arrangements with you to borrow that money from the bank on a Master's draft?

A. I don't know anything about it.

Q. From the Wells, Fargo Nevada National Bank?

A. I don't know.

Q. You never knew about that? A. No, sir.

Q. You never went to the bank and told them not to loan the money to Mr. Hickman on the master's draft? A. No, sir.

Testimony of M. H. Hickman, for Plaintiff.

M. H. HICKMAN, recalled for the plaintiff.

Mr. ACKERMAN.—Q. Did you or did you not transfer your interest in the "William Olsen" on the 7th day of December, 1915, to Mrs. Elizabeth Nevins with intent to prefer her over your other creditors? A. Yes, sir, I turned it over.

Q. With intent to prefer her over your other creditors? A. Yes, sir.

Q. The amount of your interest in the "William Olsen" and the amount so transferred was a 75 one hundred and twenty-eighth interest?

A. Yes, sir.

Q. What in your opinion is the value of the "Olsen" at the present time?

(Testimony of M. H. Hickman.)

A. I was holding her—

Q. (Intg.) Answer the question directly.

A. I asked $18,000 for her. [38]

Q. What in your opinion is the present value of the "William Olsen"? A. Now?

Q. Yes. A. I should say $20,000.

Q. You were the managing owner?

A. Yes, sir; that is the entire vessel.

Q. That is, you were the managing owner of the "William Olsen" for sometime prior to the 7th of December, 1915? A. Yes, sir.

Q. For how long? A. Since December, 1909.

Q. Who is managing owner of the "William Olsen" now? A. I am.

Q. What interest do you own now in the "Olsen"?

A. One sixty-fourth that I put the valuation of $12,000 for the vessel.

Q. Whom did you buy it from?

A. A man by the name of English.

Q. When?

A. I think it was April or May; I forget which.

Q. Of this year? A. Yes, sir.

Q. Did you receive a salary as such managing owner?

A. No, sir, I just got a commission on the charter; that is all.

Q. Is the "Olsen" in port? A. No, sir.

Q. Is it chartered? A. Yes, sir.

Q. To whom?

A. William R. Grace & Company.

(Testimony of M. H. Hickman.)

Q. Is it now under voyage on charter to Grace & Company? A. Yes, sir.

Q. Is she going out to sea?

A. Yes, to Port Gamble.

Q. Where is that? A. In Puget Sound.

Mr. ACKERMAN.—I may prove that up under allegation 10.

Mr. LUCAS.—We do not deny it in the answer; so I assume it is admitted.

Mr. ACKERMAN.—At the time you testified before the referee in bankruptcy, which was on February 21st, 1916, I asked you if you were still managing owner and you said no? A. Yes.

Q. I asked you if you manged it and you said no?

A. Yes. [39]

Q. I asked you who managed it. You said Mrs. Nevins and I asked you if you managed it for her and you said yes; it that a correct answer to the question? A. Yes.

Q. Were you at that time the manager of the "Olsen" for Mrs. Nevins?

A. There was nothing to manage.

Q. Did you look out for the details?

A. There were no details to look after, but I think on the 24th I was because there were details cropping up.

Q. For Mrs. Nevins?

A. Yes, sir; I had an offer for a charter.

Q. Mr. ACKERMAN.—Will counsel for the defendant admit that a demand was made upon plaintiff for a retransfer of the property?

(Testimony of M. H. Hickman.)

Mr. LUCAS.—That is admitted by the answer.

The COURT.—Q. The "William Olsen" was worth $18,000 in December, 1915?

A. I was asking $18,000 for her; I had an offer of $13,000 for the entire vessel; boats have advanced since then.

Mr. ACKERMAN.—Q. Do you recall meeting me in I think it was October or November, 1915?

A. Yes, sir.

Q. And being advised by me that I could arrange a sale for the "Olsen"?

A: If I remember, in 1915.

Q. In the latter part of 1915?

A. I should say October, 1915.

Q. Do you remember me advising you at that time that I was going to get about $15,000?

A. I don't remember.

Q. Did I state to you the name of the purchaser whom I had?

A. In October, 1915, I was in your office and made a payment on account of the mortgage, and subsequent to that you told me, coming in on the car, I think it was, that Henry Moore would have given me $15,000; but you never gave me any offer.

Mr. ACKERMAN.—That is correct.

Mr. LUCAS.—Q. Has the "Olsen" increased in value a little A. Ships have advanced.

Q. What is the reason—

The COURT.—We have been threshing that out in every [40] admiralty case we have.

(Testimony of M. H. Hickman.)

Mr. ACKERMAN.—That is the plaintiff's case, your Honor.

Mr. LUCAS.—I wish at this time to move for a judgment for the defendant upon the ground that they did not connect the defendant in this matter with any knowledge. I am satisfied that they have not made out a case.

Testimony of Mrs. Elizabeth Nevins, for Defendant.

Mrs. ELIZABETH NEVINS, called for the defendant. Sworn.

Mr. LUCAS.—Q. You are Mrs. Elizabeth Nevins, the defendant in this case? A. Yes, sir.

Q. Mr. Hickman is your son-in-law?

A. Yes, sir.

Q. Mrs. Hickman is your daughter?

A. Yes, sir.

Q. Where do you live?

A. Part of my time here and part of my time in Vallejo.

Q. Part of the time you live with your daughter?

A. Part with my son.

Q. How long have you known Mr. Hickman?

A. A couple of years before he was married to my daughter.

Q. He was married about twenty years ago?

A. I think it was about twenty years ago.

Q. I will ask you, Mrs. Nevins, if you, on different occasions loaned any money to Mr. Hickman?

A. I have, at my daughter's request.

Q. At your daughter's request? A. Yes, sir.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Did Mr. Hickman ever come to you personally and ask you for any money? A. No, he never did.

Q. Did he ever state to you that he wanted any money to use in his business?

A. He never spoke of his business to me. I knew nothing at all about his business.

Q. You knew nothing at all about his business?

A. No, I did not.

Q. Have you considerable means?

A. Well, some.

Q. What is the source of your income?

A. I have rents; I have sugar stock; I have interest money. [41]

Q. During the last 8 or 10 years what has been your average monthly income, about?

A. It has been as high as four hundred or $500 a month; at present it is less; it is not so much.

Q. About what are your average expenses?

A. I do not have any.

Q. Practically no expense. A. No.

Q. Who attends to your business affairs?

A. I attend to them myself; I have not very much business.

Q. Have you ever noticed, Mrs. Nevins, any difference in the manner of living at Mr. Hickman's house in the last two or three years—have they lived any different from what they lived before?

A. It is about the same as far as I can see.

Q. Did they live in a comfortable manner?

A. Yes, sir.

(Testimony of Mrs. Elizabeth Nevins.)

Q. They had all the ordinary comforts of life, did they? A. Yes, sir.

Q. Did anyone ever present any bills to you for that household? A. Never.

Q. Did you at any time know that Mr. Hickman was in any financial difficulties at all.

A. I never knew anything about his affairs until I saw it in the paper.

Q. When was that? A. That was in December.

Q. December, 1915? A. Yes, sir.

Q. What was it that you saw in the paper?

A. Something about bankruptcy, something about a sale of the Bay Shore Drayage Company.

Q. And Mr. Hickman's name was mentioned?

A. I knew it was him from reading it.

Q. That was in the latter part of December, was it, Mrs. Nevins? A. Yes, sir.

Q. When did you know of his own bankruptcy, when did you first find out about the fact of Mr. Hickman being bankrupt?

A. I read it in the paper.

Q. Your daughter did not mention it? A. No.

Q. Did Mr. Hickman mention it to you?

A. Never. [42]

Q. You did not know Mr. Hickman was a bankrupt until you read it in the paper?

A. I never knew anything about it.

Q. That was subsequent, was it, to the transfer of Mr. Hickman's interest in the "William Olsen" to you; that was after the transfer? A. Yes, sir.

Q. I will ask you in the 22 years that you have

(Testimony of Mrs. Elizabeth Nevins.)

known Mr. Hickman, if you had any reason to have anything but absolute confidence in him?

A. No, I always had perfect confidence in him.

Q. The transfer of Mr. Hickman's interest in the "William Olsen"—that was made to you in consideration for the indebtedness that Hickman owed to you; is that correct?

A. That is what he told me.

Q. For the promissory notes—the two sums of money that he owed you on that date. Is that correct? A. I think so.

Q. You have really had no worry in your business affairs? A. Not a particle.

Q. Were you ever engaged in business?

A. Never; my husband was.

Q. In what business?

A. He was in the Mint; and he was in the custom-house service.

Q. Was it ever your habit to discuss business affairs with your husband?

A. No, never; he never had any business affairs; he was employed and paid by the month.

Q. Are you acquainted with any of Mr. Hickman's business associates?

A. No, sir.

Q. Do you know any of the wives or any of the lady relatives of Mr. Hickman's business associates?

A. No, sir, I do not.

Q. Until after you read in the paper that Mr. Hickman was a bankrupt, up to that time had you

(Testimony of Mrs. Elizabeth Nevins.)

any intimation that his financial condition was not sound and solvent?

A. I never suspected it.

Cross-examination.

Mr. ACKERMAN.—Q. You reside part of the time in Vallejo and part of the time in San Francisco, do you? A. Yes, sir.

Q. During the time you are in San Francisco you are with your daughter, and while you are in Vallejo you are with your son? [43] A. Yes, sir.

Q. In what business is your son?

A. He was secretary of the Vallejo Ferry Company for a number of years; at present time I do not know what he is doing.

Q. What salary did your son receive?

A. I do not know; I never asked him; I do not know what salary he received.

Q. Is he married? A. Yes, sir.

Q. Has he any children? A. One.

Q. Are you in the habit of stopping at his house?

A. Yes, sir.

Q. Do you know what salary he received while he was filling that position?

A. I don't know; I was under the impression that he got $150; I am not sure; I never asked him.

Q. Has your son any interest outside of his position in the Ferry Company? A. He has property.

Q. Where?

A. Some in San Francisco and some in Vallejo.

Q. Do you know what the value of the property in San Francisco is? A. No, I do not.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Do you know what the value of the property in Vallejo is? A. No.

Q. Does he own it jointly with you or alone?

A. Alone.

Q. Did he inherit any money from his father?

A. No, he got most of the money from business that he was in.

Q. Have you given your son any money during the past few years? A. Yes, sir.

Q. How much?

A. Ten or $12,000; I gave him money to help out to buy a piece of property or something of that kind.

Q. Did he always tell you what he wanted the money for? A. Yes, sir.

Q. Did you give him money to buy the property in San Francisco? A. Yes, sir.

Q. Do you know what he paid for it?

A. I think he paid $15,000.

Q. Why do you say you do not know what he is worth, when I have asked you what his property is worth?

A. I know what that is [44] worth, the San Francisco property, but not the Vallejo property.

Q. Did you give him money to buy the Vallejo property? A. No, I do not know as I did.

Q. Are you sure that you did not?

A. I gave him money; I do not know what use he put it to.

Q. Do you say that you gave him money for the purpose of purchasing the property that he bought?

(Testimony of Mrs. Elizabeth Nevins.)

A. Yes, the property in the city.

Q. Did he give you a mortgage on the property or security, or anything? A. No.

Q. Has he ever paid you back? A. No.

Q. Does he pay you interest on it? A. Yes, sir.

Q. Regularly? A. Whenever I want it I get it.

Q. Has it been paid regularly? A. No.

Q. Whenever you need it you ask for it?

A. Yes, sir.

Q. How often do you ask for it?

A. Whenever I want it.

Q. Is that regularly once a year, or twice a year or three times a year, or what?

A. Whenever it is necessary.

Q. Do you know exactly how much money you have loaned your son?

A. No, I do not think I do exactly.

Q. You do not know how much he owes you at the present time? A. No.

Q. Do you say he paid you about $10,000?

A. I suppose it is about that.

Q. Have you any notes for it? A. No.

Q. Have you any other notes for the indebtedness; how would you find out how much money he owes you?

A. Well, I do not know; I depend on his honor.

Q. You would ask him? A. Certainly.

Q. Mrs. Nevins, how much money have you; what would you say that you were worth, financially?

A. I could not say.

Q. In order to determine that you would have to

(Testimony of Mrs. Elizabeth Nevins.)

appraise the various stocks that you have; is that a fact? A. Yes, sir.

Q. Tell me approximately how much money are you worth? [45]

A. It is kind of hard for me to do that.

Q. It is very embarrassing for me, but please tell me how much money you are worth?

A. Do you mean for how long—how many years; I do not understand what you want me to say.

The COURT.—Q. How much do you regard yourself as being worth, in a general way?

A. Ten or $15,000.

Q. Ten or $15,000? A. Yes, sir.

Mr. ACKERMAN.—Q. You say you have an income of four or $500 a month—sometimes more sometimes it is less? A. Yes, sir.

Q. Did you receive that income yourself?

A. I do not get that much income now.

Q. I remember that you did state that it had been reduced. Do you receive what you do receive at the present time—do you get the income yourself?

A. I get some of that income; some of it my son gives me.

Q. How do you get it—by checks?

A. Some of it as rents; my son collects some of the rents.

Q. Who collects the other rents?

A. A gentleman.

Q. Does he deliver the rent to you by mail?

A. Yes, sir.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Do you know how much income your property brings in? A. About $100 a month.

Q. How much income do you get on sugar stock?

A. I get $50 now.

Q. How long has your husband been dead?

A. 15 or 16 years.

Q. During all that time have you looked after your business affairs?

A. No, my son, he has done it.

Q. How old is your son? A. 43.

Q. Do you remember having said on direct examination that you attended to the business affairs yourself?

A. I do not have much business affairs to attend to.

Q. Do you attend to them, or do you not?

A. My son does.

Q. Then when you said you did attend to your business affairs yourself, you were mistaken.

A. He collects the rents up [46] there and that is about all there is.

Q. You loaned to Mr. Hickman at various times since 1905 considerable sums of money, did you not?

A. Yes, sir.

Q. You took his note sometimes, and other times you did not; is that correct? A. I guess so.

Q. You do not know, as a matter of fact, whether you did or did not? A. The statement will show.

Q. He owed you in 1912, $6,100, that note, with interest? A. Yes, sir.

Q. The twenty-seven or $2,800 was due to you by

(Testimony of Mrs. Elizabeth Nevins.)

the Bay Shore Drayage Company? A. Yes.

Q. This is a total of over $12,000. A. Yes, sir.

Q. Wasn't that a large sum of money for a person in your circumstances to loan?

A. Well, I had it, and I gave it to him.

Q. Did you make any inquiries as to whether or not he could repay it? A. I do not think I did.

Q. Did you ever ask him to pay interest on that money? A. No.

Q. Did it ever arouse any suspicion in your mind that he paid no amount on the interest since 1905?

A. Yes, he paid me.

Q. When did he pay you money?

A. Some years ago.

Q. How many years ago? A. I don't remember.

Q. Can you fix the date approximately?

A. No.

Q. Have you a poor memory?

A. I guess I have.

Q. Is it difficult for you to remember back several years? A. Yes, sir.

Q. You have no idea in what year or month it occurred?

A. No, I could not tell you; he has all the statements.

Q. Did he ever pay you interest on that note of $6,100 since he gave it to you in 1912?

A. He may have.

Q. Did you ever ask him for any interest on it?

A. No, I never did.

Q. Who would ask you for the money that you

(Testimony of Mrs. Elizabeth Nevins.)

loaned to Mr. Hickman, your daughter?

A. Yes, sir. [47]

Q. What conversation would take place?

A. She would tell me he needed money for equipment or something of that kind.

Q. She came to you quite frequently, did she?

A. Not so very often, only when it was necessary.

Q. Did you make any complaint to your daughter about the amounts that Mr. Hickman was borrowing from you? A. No, I did not.

Q. Did you think they were rather large?

A. No, I did not give it any thought.

Q. You were never concerned as to whether or not Hickman could pay it back?

A. I expected him to pay it.

Q. Did you ever ask him to pay it back?

A. No.

Q. Did it arouse any suspicion in your mind that Hickman did not pay you interest at any time since 1912? A. No.

Q. You just took it for granted that he did not pay interest and that he had a good reason, and you did not inquire into it? A. Yes, sir.

Q. You said that you required no money for your personal need, that you received your income and put it in the bank, that you had no expenses; is that correct? A. Only for little things that I need.

Q. Personal requirements, clothes and so forth?

A. Yes, sir.

Q. How much money do you spend each month for that? A. Not very much.

(Testimony of Mrs. Elizabeth Nevins.)

Q. How much? A. Fifty or $60.

Q. It only costs fifty or $60 a month for you to live? A. Yes, sir.

Q. Is that all the money you spend per month?

A. That is all.

Q. Where do you keep your money—in the bank?

A. Yes, sir.

Q. Do you draw checks? A. Yes, sir.

Q. You get your checks returned from the bank each month? [48]

A. Yes, sir, whenever they have them.

Q. Do you examine those checks and see that they are right, and correspond with your bank-book?

A. No.

Q. Your average expenditures per month are about $50? A. Yes, sir.

Q. Your checks total over $50 or $60 monthly?

A. Somewhere around that; sometimes I might spend more.

Q. Did it ever exceed much more than that?

A. Yes, sometimes it does. Maybe it takes it all.

Q. What do you mean by "All"?

A. All that I have.

Q. How much would that be? A. $100 or $120.

Q. What did you do with the difference between $100 or $125 and four or $500.

A. I mean now; I do not get that much money now.

Q. How much do you get now?

A. I get about—I don't know. I do not get any interest, and of course I get less.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Have you ever been short of money?

A. No, I never have.

Q. I understand you to say that your expenses per month are a minimum of fifty and a maximum of $120?

A. It all depends on what I buy, where I travel and what I do with it.

Q. The average is $50 a month; is that correct?

A. Yes, sir.

Q. Have you any home, Mrs. Nevins A. No.

Q. You reside alternately with your daughter and your son? A. Yes, sir.

Q. How much time do you spend with your daughter?

A. Most of the time, I guess; I go up every month to Vallejo and stay for a week or ten days, as long as I want to.

Q. Then you come to your son's house?

A. Yes, sir.

Q. And live with his family? A. Yes, sir.

Q. Did you ever notice any difference in the way the Hickmans live and the Nevins live?

A. About the same.

Q. During all the time you have been with your daughter during 1915, did you ever say to your daughter, "How is your husband doing," or "How is Mr. Hickman doing"?

A. I do not think I ever asked [49] any questions.

Q. You never displayed any interest? A. No.

Q. Have they any children? A. Yes, sir.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Do you ever purchase any clothing or ornaments of any kind for the children?

A. I am always doing that; that is my privilege to buy something, should I wish to.

Q. Have you bought clothes for your daughter?

A. If I see anything I thought she liked I would.

Q. When did you ever buy a dress for her?

A. I don't know.

Q. Tax your memory.

The COURT.—The Court cannot draw any reasonable conclusion from that. It is too common an occurrence for a mother to buy clothes for the children.

(A recess was here taken until 2 P. M.)

AFTERNOON SESSION—2 P. M.

Mr. ACKERMAN.—If the Court please, before proceeding further, I should like to have the Court's permission to read a few paragraphs from the opinion of the District Court for the Southern District of New York in the case of Wright vs. Sampter, bearing upon the line the cross-examination has taken in this case. This is an action to set aside a preference. The case is reported in 18 American Bankruptcy Reports, at page 355. The person against whom it was sought to set aside the preference in this case was a niece of the bankrupt. The Court said:

"It has frequently been said in actions turning upon the presence or absence of reasonable cause to believe a material or vital fact, that anything 'sufficient to excite attention and put a party on inquiry is

(Testimony of Mrs. Elizabeth Nevins.)

notice of everything to which inquiry should have led' and that known facts 'calculated to awaken suspicion' will justify an inference of actual and complete knowledge. In re Knopf, 16 American Bankruptcy Reports, 432; Parker v. Conner, 118 N. Y. 24.

[50]

But obviously facts, whether producing certainty or merely suspicion, must have a mind upon which to operate and affect, and the rule is equally well established that it is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of 'an ordinarily intelligent man' (Bank v. Cook, 95 U. S. 343; Toof v. Martin, 13 Wall. 40); 'a person of ordinary prudence and discretion' (Wager v. Hall, 16 Wall. 584); 'an ordinarily prudent man' (In re Eggert, 4 Am. B. R. 449); 'a prudent man' (Dutcher v. Wright, 94 U. S. 553).

The peculiarity of this case is that the mind to be affected is that of a confiding niece, wholly unacquainted with business knowledge, and however intelligent and prudent in matters within her own experience, incapable of comprehending the significance of business facts, which would have been more than enlightening to men of the business world. It is therefore urged by the defendants that Barbour v. Priest, 103 U. S. 293, justifies the proposition that not only must the facts exist and be sufficiently impressive to make inquiry in such minds as are catalogued in the cases above cited, but they must be sufficient to impress their significance upon the mind

(Testimony of Mrs. Elizabeth Nevins.)

of the person to be affected—in this case a woman leading a life apart from the world of business. It was indeed said in the case last cited (one inducing great sympathy for the preferred creditor) that it is 'necessary to prove the existence of this reasonable cause of belief * * * in the mind of the preferred party (p. 296).

But those words must be taken in conjunction with the whole opinion, which was written in express consonance with Grant v. Bank, *supra,* and the phrase quoted I take to assume in "the preferred party" the mind of 'an ordinarily intelligent man.'

It would be intolerable that the voidability of a preference should depend not upon the effect of facts admittedly or by proof knows to a defendant, but upon the degree of intelligence or experience which such defendant was capable of exercising in [51] respect thereto; such a rule would put a premium upon ignorance and encourage the assumption thereof.

The rule here applicable is therefore: Would an ordinarily intelligent and prudent business man have had reasonable cause to believe upon any facts known to Miss Sampter that her uncle intended to prefer herself, her sister and mother?"

Mr. ACKERMAN.—It is most unfortunate for plaintiff's case that we are unable to prove direct knowledge; the proof of facts which would have led an ordinarily prudent business man are clearly applicable to the—

(Testimony of Mrs. Elizabeth Nevins.)

The COURT.—The matter under discussion was whether the item of clothes should be regarded as suspicion and tend to show that she knew or had reason to believe that the husband was insolvent, but I say it does not appeal to me as having such tendency.

Mr. ACKERMAN.—I think it would in the light that she was contributing to the household necessities when possibly Mr. Hickman had not been able to provide those necessities himself.

The COURT.—We will meet that when we come to it.

Testimony of Mrs. Elizabeth Nevins, for Defendant (Recalled—Cross-examination).

Mrs. ELIZABETH NEVINS, recalled for further cross-examination.

Mr. ACKERMAN.—Q. Mrs. Nevins, were you in the habit, during the past years, of providing any other household goods or household necessities to Mrs. Hickman or Mr. Hickman? A. No.

Q. Did you never purchase things for use in the house?

A. No, I don't think I ever did. I have bought some presents for both families.

Q. Mrs. Nevins, do you recall, at the hearing before the referee in bankruptcy, which was held in this case some months ago, that I asked you the question, "Do you again say that if you wanted to provide for anything like household necessities you did so," and if you answered yes?

(Testimony of Mrs. Elizabeth Nevins.)

A. I bought anything that suited me, if I [52] saw anything I wanted to buy.

Q. You did not make inquiries whether the family could afford to purchase these things for themselves?

A. No, I bought them myself.

Q. Will you tell me the type of conversation that transpired between you and Mrs. Hickman on the occasions when Mrs. Hickman came to you to borrow money for the use of her husband?

A. She would tell me that he needed equipment in his business and ask me for some money, and I gave it to her.

Q. Those times were rather frequent, were they not? A. No.

Q. You loaned him on a number of occasions fifteen hundred or $1250 and like sums? A. Yes, sir.

Q. Did you make inquiries to see what they were needed for? A. No, I did not.

Q. Did your daughter tell you?

A. No, I don't think she did.

Q. She would simply come to you and say Mr. Hickman needs $1,250 or $1,500, can you let me have it? Is that about it? A. Yes, sir.

Q. Didn't you ever say, Mrs. Nevins, what does he need it for? A. No.

Q. What business was Mr. Hickman engaged in during 1915?

A. I do not know what he was doing.

Q. Did he have anything to do, so far as you know, with the Bay Shore Drayage Company?

(Testimony of Mrs. Elizabeth Nevins.)

A. I never asked him, I do not know.

Q. Did you ever loan any money to the Bay Shore Drayage Company? A. Yes, some money.

Q. Who did you give it to?

A. To my daughter.

Q. For what purpose?

A. I supposed for his use.

Q. Did you know that Mr. Hickman was connected with it?

A. Yes, I suppose that he wanted it to buy horses or buy hay.

Q. You said you did not know what business he was engaged in, and that he was in the Bay Shore Drayage Company? A. Yes. [53]

Q. You recall having signed this paper—that is your signature—referring to exhibit No. 2?

A. Yes, sir.

Q. Who asked you to sign that paper?

A. I don't remember—my daughter.

Q. Did you have any discussion with her about this paper at the time?

A. Yes, sir. She told me Mr. Greenwald was going to assist her husband and she wanted me to sign that so that he could get his money first.

Q. Assist her husband in the Bay Shore Drayage Company? A. I suppose so, yes.

Q. Did you read this agreement before you signed it? A. No, I do not think I did.

Q. Do you know what that agreement provides for, Mrs. Nevins? A. I do not know.

Q. Your daughter told you, did she?

(Testimony of Mrs. Elizabeth Nevins.)

A. I don't remember; if I did I do not remember it.

Q. You may look at it, perhaps it will refresh your mind as having seen it before. Would you like me to read it to you, Mrs. Nevins. It states that "this agreement made and entered into this 21st day of January, 1915, by and between Mrs. Lizzie Nevins and M. H. Hickman, parties of the first part, and the Bay Shore Drayage Company, a corporation, party of the second part, and O. H. Greenwald, party of the third part," and it recites that Mr. Hickman is indebted to you in certain amounts, and it provides that for and in consideration of the advances by the party of the third part to the party of the second part of certain sums of money or any sums of money for the purpose of carrying on the business of the party of the second part, the first party hereby gives her written consent to the payment by the party of the second part of the indebtedness of the said party of the second part to the said party of the third part in preference to its indebtedness to the parties of the first part, and the [54] party of the second part agrees that it will repay the indebtedness of the party of the third part in preference to the indebtedness of the parties of the first part; and the parties of the first part hereby agree to defer any action or claim or collection of their said indebtedness against the said party of the second part until the indebtedness of the party of the third part has been paid in full. In other words,

(Testimony of Mrs. Elizabeth Nevins.)

Mr. Greenwald is to be paid first. That is approximately what your daughter told you, is it not?

A. Yes, that is what I understand.

Q. Did that circumstance create any suspicion in your mind that all was not well with Mr. Hickman?

A. No, I never thought anything of it.

Q. It did not occur to you when you were asked, nor did you presume to care that you were allowing someone else who had just put his money in the business, to get his money before you got your money—that did not arouse any suspicion in your mind, any suspicion that business was not going well?

A. What? I don't know.

Q. The question was whether these facts created any suspicion in your mind? A. No, they did not.

Q. Didn't you say to Mrs. Hickman at any time, "Is Mr. Hickman getting along all right"?

A. She did not mention anything about his business to me.

Q. All she said was, "Sign this paper"?

A. She told me Mr. Greenwald was going to assist her, and asked her if I would sign that so he would get his money first; that was the conversation about it.

Q. You knew at that time that Mr. Hickman was in the Bay Shore Drayage Company at that time?

A. Yes, sir.

Q. Did Mr. Greenwald?

A. I never saw Mr. Greenwald until I saw him here to-day.

Q. He testified that he saw you on the boat on the

(Testimony of Mrs. Elizabeth Nevins.)

way to [55] Sausalito; do you recall that occasion?

A. I remember that I was there, but there was a crowd of gentlemen, and I did not know which was Mr. Greenwald.

Q. When did you first hear of Mr. Greenwald's name mentioned in connection with your family?

A. I don't know; I had heard his name spoken of for years.

Q. For a number of years? A. Yes, sir.

Q. What was told you about him?

A. Nothing, nothing much; they had seen him, something of that kind; nothing about any business.

Q. Did your daughter ever come to you in November, 1915, and discuss any business matters in connection with Mr. Greenwald? A. No.

Q. Did she ever ask you to pay any of his obligations, or to go on his note? A. No, she did not.

Q. Never did? A. No.

Q. Do you remember having read in the paper an article which appeared in connection with the suit which had been brought by the Albion Lumber Company against Mr. Hickman? A. No.

Q. You read the newspapers regularly, do you not? A. Yes.

Q. The first knowledge that you had of Mr. Hickman's insolvency was the information you got from the newspapers? A. Yes, sir.

Q. You did not see the item about the Albion Lumber Company suit against him? A. No, I did not.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Is it not a fact that in comparison to the amount of your property, a difference or sum or ten or $12,000 is quite a large portion of it?

A. No, I have more than that; I think that is what is left remaining to me.

Q. You have about that much left?

A. That is what I think, as near as I can count it.

Q. Did you ever loan money to anyone else?

A. No.

Q. You said you had loaned money to your son?

A. Yes—not outside [56] of my family.

Q. Did you keep any books or statements of account, or papers of any kind?

A. No, nothing of that kind.

Q. Did you give your daughter any money during the last two years, Mrs. Nevins?

A. No, I do not think I did.

Q. Try to remember and be sure?

A. No, I did not.

Q. You did not give her various sums of money during the last two years on different occasions?

A. No.

Q. Mrs. Nevins, I asked you on the occasion I referred to a moment ago, if they had borrowed money from you from time to time for small things, had they not? What is your answer to that question?

A. What do you mean by that,—the small things, what do you mean?

Q. Smaller items than $100 or $200.

A. Oh, I don't know; I don't know as they did.

Q. Do you recall having answered that they did at

(Testimony of Mrs. Elizabeth Nevins.)

the hearing before the referee, that they did borrow small amounts of money from time to time?

A. I don't think so.

Q. That is not true that they borrowed small sums of money from you from time to time?

A. I do not think I ever said so.

Q. Do you recall that I asked you on that occasion, if you ever advanced to your daughter any money, and that you replied, "Yes, I gave her money for anything she wanted"?

A. I always gave her money, I have all my life; I always did before she was married.

Q. Since she was married?

A. Before she was married I always gave her everything she wanted.

Q. Do you recall I said to you, "What do you mean, that you gave her an allowance"? To which you replied, no, if she wants a dress if I thought she wants it I gave her the money to buy it.

A. Maybe, it is; I always did do that; anything she wanted I [57] always gave her the money for it, a dress or anything of that kind.

Q. Is it true that you were never sufficiently interested in your son-in-law to make inquiry of him as to whether or not business was good?

A. I always felt that I was the mother-in-law; I did not think it was any of my business.

Q. Did you not think it was some of your business to find out whether the interest had been paid to you? A. No.

Q. Did it not occur to you that if Mr. Hickman had

(Testimony of Mrs. Elizabeth Nevins.)

not been in failing circumstances, it would not have been necessary for him to borrow money from time to time?

A. He needed it for his equipment and his business; he has nobody else to give it to him.

Q. Mr. Hickman testified, and you probably heard it, that you loaned him money to pay his taxes with?

Mr. LUCAS.—I think that is not a correct statement. She gave him money to pay taxes with; he did not say on what property it was to be paid.

Mr. ACKERMAN.—I am quite confident that on December 29, 1915, the sum of $34.40 was paid by Mrs. Nevins, and Mr. Hickman said she gave him the money for it.

Mr. LUCAS.—It was to pay her taxes; that is the truth of the matter.

Mr. ACKERMAN.—If it were to pay her taxes, it would not appear upon that statement as a charge against Nevins.

Q. Do you know, Mrs. Nevins, what he asked you for money for during the year 1908?

A. No, I do not.

Q. Did you know that he was in the plastering business? A. No, I did not.

Q. You loaned him $1,250 on February 15, 1908, a like amount on February 21st, 1908, $500 on October 17th of the same year, and [58] $500 on October 24th of the same year, all of which was used in the plastering business; you never knew anything about that plastering business? A. No, I did not.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Did Mr. Hickman ever offer to pay any money back that you loaned?

A. Yes, he has paid me back lots of times.

Q. Since 1912?

A. I don't remember,—he gave me money or a check.

Q. Do you remember receiving any money from him then since 1912?

A. I cannot say; I don't know.

Q. Did he ever speak to you and explain to you why he could not pay the interest on that note?

A. No.

Q. Did he ever say to you, "I hope to be able to pay some portion of the money that I owe, at a certain time"?

Mr. LUCAS.—That is objected to.

The COURT.—The objection is overruled.

A. We never discussed business at all.

Q. Will you kindly answer the question yes or no?

A. No.

Q. You testified, I believe, on direct examination, that you did not know of Mr. Hickman's business acquaintances or business friends, or their wives; is that correct? A. I know Mr. Masterson.

Q. Who is Mr. Masterson?

A. He used to be a partner of Mr. Hickman.

Q. How well did you know him?

A. I just met him occasionally; not very well.

Q. How long have you known him?

A. Since Mr. Hickman married my daughter.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Were they in business together at that time?

A. Yes, sir.

Q. Did they since go out of business?

A. Yes, sir.

Q. Why? A. I don't know.

Q. When did they go out of business?

A. I don't know that. [59]

Q. What business were they in?

A. They were in the lumber business.

Q. You knew about their business at that time?

A. Yes, sir.

Q. Do you know why they dissolved partnership?

A. I don't know.

Q. Do you know whether or not their business was profitable?

A. I could not say; I never asked any questions.

Q. Did you know that Mr. Hickman was the owner of the schooner "William Olsen"? A. Yes, sir.

Q. How long have you know that?

A. I knew it at the time I bought the interest myself.

Q. Do you know whether that was a profitable enterprise or not? A. I left it to him.

Q. Did he ever tell you?

A. I knew that the vessel was not making money for a long time.

Q. Who told you that?

A. I knew it from hearing different people talk about it.

Q. Who did you hear talk about it?

(Testimony of Mrs. Elizabeth Nevins.)

A. I don't know; I have more or less interest in the boat business.

Q. Do you remember any occasion that you heard anyone discuss the "William Olsen"?

A. I don't think I ever did; I don't know anybody interested in the "Olsen" except Mr. Hickman.

Q. Did Mr. Hickman ever speak to you about it?

A. No.

Q. Where did you get the information that the "Olsen" was a losing proposition?

A. Because I heard about other boats for sale, and I knew that times were hard; I had sense enough to know that.

Q. Did you make any inquiries from Mr. Hickman as to how the "Olsen" was getting on?

A. No; I knew if there was anything he would tell me.

Q. He would tell you?

A. If there was anything to tell he would. **[60]**

Q. I thought you never discussed business with him?

A. I never did; he would tell me if there was anything to tell.

Q. Why did he tell you that thing,—did you know about the Bay Shore Drayage Company?

A. He was interested in it.

Q. Why were you interested in the "Olsen" particularly? A. Because I had some money in it.

Q. How much?

A. Two-eighths or one-eighth or two-eighths.

Q. When did you buy it?

(Testimony of Mrs. Elizabeth Nevins.)

A. A little while after she was built.

Q. Were you the owner of record of one-eighth or two-eighths interest at the time you bought Mr. Hickman's share? A. Yes, sir.

Q. Did Mr. Hickman ever tell you from time to time how the "Olsen" was getting on?

A. When he had a dividend to pay he spoke of it.

Q. Did you know there was a mortgage on the "William Olsen"? A. No, I did not.

Q. Did you make any inquiries of Mr. Hickman about the "William Olsen" before you purchased it in December, 1915?

A. No, I never spoke anything about it.

Q. You never spoke to him about it at all?

A. The first I knew about it was when he told me he transferred the stock to me.

Q. You did not know anything about it before that time? A. No.

Q. You never requested him to do it? A. No.

Q. Do you know whether or not your son paid off the mortgage on the "William Olsen"?

A. I know it now because he told me of it.

Q. When did you first hear of it?

A. When I went up to Vallejo he told me of it.

Q. Was that after December, 1915?

A. It was along this spring.

Q. Are you acquainted with Mrs. Turner?

A. Yes, sir.

Q. Do you know whether or not Mrs. John Turner holds a mortgage on the "Olsen"?

A. She never discussed it with me.

(Testimony of Mrs. Elizabeth Nevins.)

Q. At your house? A. No. **[61]**

Q. Do you know whether or not Mr. Hickman owes any money to the Turners? A. No.

Q. Did you make any inquiries whatever as to how much was due creditors of the vessel—as to how much the vessel owed in December, 1913?

A. I never asked any questions at all; I had full confidence in him; I left everything to him.

Q. You did not know whether or not that vessel owed more than she was worth?

A. No, I did not.

Q. Did you know that Mr. Hickman was engaged in the warehouse business in December, 1910?

A. No, I did not.

Q. What business did you suppose he was in from 1910 to 1913? A. I did not know.

Q. You did not know?

A. I did not know anything about his affairs at all —he never talked about his affairs.

Q. Did you know he was in the lumber business?

A. Yes, sir.

Q. When was he in the lumber business?

A. He was in the lumber business when he married my daughter I think—about that time.

Q. Will you explain, please, how it happens that you know he was in the lumber business and the schooner business and did not know that he was in the plastering business?

A. He never spoke about it.

Q. He told you about the lumber business?

A. I knew it myself.

(Testimony of Mrs. Elizabeth Nevins.)

Q. How did you find it out?

A. Somebody told me.

Q. Can you remember who?

A. It was 19 or 20 years ago, I don't remember.

Q. What business was he in with Masterson?

A. The lumber business; they were partners.

Q. Do you know where their place of business was? A. Yes, sir.

Q. Did you ever visit there?

A. I don't think I did.

Q. Did you ever visit Mr. Hickman down there during the last few years?

A. Yes, sir, I was in his office on Market Street **[62]** in the Santa Marina Building several times.

Q. When was that?

A. My daughter would go down and meet him and go out to dinner.

Q. What did it say on the door?

A. I could not tell you; I forget.

Q. You cannot remember what it said on the door?

A. No.

Q. Did he have one room or two rooms?

A. That time he had two; another time he had one room.

Q. Did he have anyone in his employ down there?

A. Yes, sir.

Q. Who? A. Mr. Kern, Mr. Thompson.

Q. Did you regard it as at all strange that he had one room at one time and another room at another time?

A. No, it did not cause me any thought.

(Testimony of Mrs. Elizabeth Nevins.)

Q. It did not cause you any reflection?

A. No, sir.

Q. You do not remember what it said on the door?

A. No.

Q. Did the inscription on the door indicate what kind of business he was in,—did it say lumber business or shipping, or Bay Shore Drayage Company, or what? A. That I cannot tell you.

Q. Does Mr. Hickman and Mrs. Hickman associate with your son, Mrs. Nevins? A. Yes, sir.

Q. Frequently? A. Yes, sir.

Q. Does he come to your son's and visit them occasionally? A. Yes, sir.

Q. Did you ever know anything about the progress, financial or material, of the Hickmans—did he ever say anything concerning the financial progress of the Hickmans?

A. No, and nothing in a business way, just spoke about my daughter's health or something, or about the little boy; never in a business way.

Q. I am referring particularly to business affairs. Did he ever observe to you or you observe to him whether they were **[63]** going along well?

A. How do you mean, if they were happy?

Q. If they were getting along well in the world?

A. I had every reason to think they were; he never discussed it.

Q. What reason did you have to think they were?

A. Everything was going along very pleasantly; everything was pleasant and happy, when I was there.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Refer please just to the financial side—was there anything to indicate that they were getting along well financially?

A. Everything is always about the same.

Q. Did you ever make any observation to yourself or to your son regarding that feature of it?

A. No, I never did.

Q. Do you know whether or not your son advanced to Mr. Hickman the money necessary to pay off the Turner mortgage?

A. Yes, I think he did; he advanced some money.

Q. Then you did know there was a mortgage on the vessel? A. Yes, sir, he told me since.

The COURT.—She said she learned it in the spring of this year.

Mr. ACKERMAN.—Q. What time?

A. In April or May.

Q. Did you know when your son advanced the money on the "Olsen"?

A. No, I could not tell you.

Q. Did you find out from your son that he had loaned the money to take up that mortgage?

A. Yes, sir.

Q. Did he tell you shortly after he did it?

A. Yes, sir.

Q. When did you go to Vallejo in 1915?

A. I go up there every month—maybe oftener.

Q. He told you about having taken it up the next time you paid a visit up to Vallejo?

A. Yes, sir.

Q. Do you remember when that was?

(Testimony of Mrs. Elizabeth Nevins.)

A. That was somewhere around January or February; I think it was in February; I did not go up in January. **[64]**

Q. Did you go up there in November?

A. No, I do not think I did.

Q. Did you go up in October?

A. I might have.

Q. Was it not your habit to go up there and spend two weeks out of each month?

A. Not all of the time.

Q. Are you quite sure you were not there in November?

A. I don't remember being there in November.

Q. Did you not see your son at any time during November? A. I would not be sure.

Q. Was it your impression that he told you about this mortgage on the "Olsen" the first time he saw you after he had loaned Mr. Hickman this money?

A. I think it was.

Q. Your daughter has been ill from time to time with asthma, has she not?

A. Yes, sir, for the last couple of years.

Q. And been at the hospital on various occasions?

A. Yes, sir.

Q. Did you pay the hospital bills? A. No.

Q. Never paid any expenses at the hospital?

A. No, I do not think I did.

Q. Are you sure?

A. Yes, sir, he paid all the bills.

Q. Did you pay the nurse? A. No.

Q. Or the doctor? A. No.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Are you sure? A. Yes.

Q. Did you keep checks in which you recorded all such expenditure? A. No.

Q. How did you pay the money, by check, did you carry money around with you?

A. When I had it I paid it.

Q. Do you carry large sums of money about with you? A. No.

Q. Are you quite positive that you never paid any hospital expenses in connection with your daughter's illness? A. I don't think I ever did.

Q. Are you sure? A. I am pretty sure. **[65]**

Q. You never made any inquiry of Mr. Hickman to see what he was using the money for that he borrowed from you? A. No.

Q. You do not know whether he was using the money to pay out little bills of business?

A. No, I don't know.

Q. Did Mr. Hickman ever ask you to loan him the money to take up the mortgage on the "Olsen"?

A. No.

Q. You discussed the "Olsen" with Mr. Hickman, did you not?

A. Not until lately; we had talked lately.

Q. During the year 1915?

A. No, I don't think I ever did.

Q. You had some interest in the "Olsen"?

A. Yes, sir.

Q. You never made any inquiry about your one-eighth share?

A. No, because I had confidence in him; I knew

(Testimony of Mrs. Elizabeth Nevins.)

he would do what was right. I had confidence in him.

Q. Who asked you to loan the money to the Bay Shore Drayage Company? A. My daughter.

Q. Did you ever ask her when she requested a loan of money from you, what they needed the money for? A. She told me.

Q. What did she say?

A. She said that Mr. Greenwald was going to assist them, but he wanted to get his money first.

Q. I am referring to the occasion when you loaned the money, did you make inquiry or were you told what the Bay Shore Drayage Company needed money for? A. At what time?

Q. I understand it was within the last few years.

A. I suppose to buy equipment.

Q. On what do you base that supposition? Were you ever informed what it was needed for?

A. No, I knew that he was starting out in business and that he needed it.

Q. You say that you are in the habit of periodically paying visits to Mr. Hickman at his office; did you pay such visits during 1915?

A. I don't think I was ever there during 1915.

Q. You never visited *in* in 1915?

A. I don't think so. **[66]**

Q. Did I understand you correctly when I understood you to say that you made occasional visits to his office in company with Mrs. Hickman?

A. Yes, sir.

Q. That was not in the year 1915?

(Testimony of Mrs. Elizabeth Nevins.)

A. No, because I was most of the time at the Fair.

Q. Did you never on any occasion in 1915 visit him?

A. I had no occasion to; I was always home.

Q. Did you ever go down there with Mrs. Hickman? A. I don't remember of it.

Q. Do you remember where his office was during 1915? A. No, I do not.

Q. Did you ever ring him up on the telephone?

A. I do not think I did.

Q. Are you sure?

A. I do not remember of ringing him up.

Q. If somebody asked you where they could reach Mr. Hickman down there, you could not tell them?

A. Not after he left the Santa Marina Building.

Q. When did he leave? A. I don't know.

Q. When did you last visit him at that building?

A. I don't know. A couple of years ago I guess.

Q. Has Mr. Hickman always been a good husband, as far as you know? A. Always, yes.

Q. Did Mrs. Hickman ever appear to you to be worried or concerned about anything?

A. No, I don't think she did; I never could tell it on her; I always thought since that was probably the cause of her sickness.

Q. You never knew at the time she looked worried or seems worried?

A. No, she was sick; I knew that.

Q. How old are you Mrs. Nevins?

A. Sixty-four years last April.

Q. Did you have any occupation prior to your

(Testimony of Mrs. Elizabeth Nevins.)

marriage? A. No. [67]

Q. You were always a woman of leisure?

A. Yes, sir.

Q. When your husband was in business did you ever assist him? A. He was never in business.

Q. He held some official office? A. Yes, sir.

Q. What official position did he hold?

A. He was foreman in Mare Island; he was in the custom-house, and in the Mint.

Q. What business was Mr. Hickman in during the year 1915? A. I don't know.

Q. You don't know anything about it? A. No.

Q. What did you think when you saw this agreement, "Exhibit No. 2" which you signed?

A. I knew he was in the Bay Shore Drayage Company, if that is what you mean?

Q. Yes. A. That is all I did know.

Q. Did you know your daughter was a stockholder in the Bay Shore Drayage Company?

A. Yes, sir.

Q. Did you ever ask her how the Bay Shore Company was getting on? A. No.

Q. You were not interested in that? A. No.

Q. If you had been asked during 1915 whether the Bay Shore Drayage Company was doing well or poorly, you could not have replied?

A. No, I knew nothing about it.

Q. Where do you keep that note that Mr. Hickman gave you for $6,100 in 1912?

A. In a box in the safe deposit.

Q. Did anyone else have access to that box?

(Testimony of Mrs. Elizabeth Nevins.)

A. Yes.

Q. Who? A. My daughter.

Q. What papers do you keep in that box?

A. Oh, insurance papers.

Q. What kind of insurance?

A. Fire insurance.

Q. Anything else?

A. Oh, one thing and another.

Q. Any deeds? A. Yes, sir.

Q. What else? A. I guess that was all. [68]

Q. Any tax receipts?

A. Yes, sir, I guess there were some there too.

Q. Some sugar stock? A. Yes, sir.

Q. Then it is a fact that you were attending to your own business affairs, of what property was in your own possession? A. Yes, sir.

Q. Do you know whether or not your son knew anything about Mr. Hickman's affairs?

A. I know he did not.

Q. How do you know? A. He told me so.

Q. You must have discussed it?

A. I asked him if he knew anything about it.

Q. Prior to the year 1915 did you ever discuss it with him? A. No, sir.

Q. How do you know he never knew about it yourself?

A. He told me so; I mean about this last business.

Q. I refer entirely to 1915.

Q. You knew it subsequent to that time?

A. It was this spring I spoke to him about Mr. Hickman's business.

(Testimony of Mrs. Elizabeth Nevins.)

Q. Do you know whether or not he knew anything about Mr. Hickman prior to the year 1915?

A. I do not think he did.

Q. How do you know?

A. He never spoke about it if he did.

Q. Did you ever get a dividend from the "William Olsen"? A. Yes, sir, some years ago.

Q. Do you know enough about the "William Olsen" to say how she is doing, how much money the vessel owes, or how much is to her credit?

A. No.

Q. Were you managing owner of the "William Olsen"? A. No.

Q. In 1916, after the transfer to you of the Hickman interest? A. Yes.

Q. What did you do as managing owner?

A. Mr. Hickman is my agent.

Q. He acted as your agent? A. Yes, sir.

Q. Did you sign the checks?

A. I do not think there was any checks. **[69]**

Q. Did you sign a card or the card at the bank authorizing you to sign checks?

A. I signed something at the bank; I suppose it was that.

Q. You did not read it?

A. It was something about—

Q. Do you know whether or not you read it?

A. Yes, sir, I did, but I cannot remember it.

Q. Why did you transfer your stock in the Bay Shore Drayage Company?

(Testimony of Mrs. Elizabeth Nevins.)

A. I did not know that the stock was out of my possession until lately.

Q. You never took any interest in the affairs of the Bay Shore Drayage Company? A. No.

Q. Were you impressed with the fact when you saw this paper marked "Exhibit No. 2," that the Bay Shore Drayage Company was in some financial difficulty? A. No, I was not.

Q. Do you suppose Mrs. Nevins, that people borrow money if they don't need it.

A. I suppose he wanted it.

Q. Do you say that you first found out about the "William Olsen" and the mortgage on the "William Olsen" this spring? A. Yes, sir.

Q. I will call your attention to the testimony that you gave on February 21st, 1916: did you advance the money necessary to pay off the mortgage on the "William Olsen"? A. No, I did not.

Q. Did he, do you know?

A. My son was not—

Q. —Just answer if you know,—if you do not know say so? A. No.

Q. You do not know whether it was your son or not? A. I understand it was my son.

Q. Who told you? A. Mr. Hickman.

Q. You must have had this information in February, 1916? A. Maybe I did; my son did too.

Mr. LUCAS.—That is the spring of 1916.

Mr. ACKERMAN.—Q. You did not make any inquiries of anyone at all [70] as to whether or not it was your son who loaned your money to Mr. Hick-

(Testimony of Mrs. Elizabeth Nevins.)

man? A. No, I did not ask anybody.

Q. Did you ever ask your son? A. No.

Q. Did your son ever ask you if Mr. Hickman had paid back any of the money? A. No.

Q. Does he know how much money Mr. Hickman owes you? A. I don't think so.

Q. Is your son in court? A. No, sir.

Redirect Examination.

Mr. LUCAS.—Q. Mr. Ackerman just asked you about your safe deposit box, Mrs. Nevins: you said that both you and your daughter had access to it?

A. Yes, sir.

Q. As a matter of fact who went to that safe deposit box most frequently, you or your daughter?

A. My daughter.

Q. I will ask you whether or not you wanted to go into the bank and get in the safe deposit box, and they really did not know you and hesitated to let you gain admission to your own box; is that true?

A. Yes, sir.

Q. Counsel brought out on cross-examination something about your personal wealth; how much money have you in the bank at the present time?

A. I have about $4,300.

Q. Have you had less than that amount in the bank at any time during the last 8 or 10 years that you can remember?

A. That is the smallest I ever had.

Q. Have you any real property? A. I have.

Q. Where is it?

A. In Vallejo, and some in San Francisco.

Q. How much real property in Vallejo; what does

(Testimony of Mrs. Elizabeth Nevins.)

your Vallejo real property consist of?

A. A house and two lots, on the main street.

Q. Does it bring in any income?

A. Yes, sir, about $70 a month.

Q. Is it business property or residential property?

A. It is residential property. [71]

Q. What do you believe it is reasonably worth?

A. I suppose ten or $11,000.

Q. Have you any real property in San Francisco?

A. One piece.

Q. Where is it?

A. On Page Street, 1767 Page Street.

Q. Does it bring you in any income?

A. Yes, sir.

Q. How much?

A. I think $42. $40, and then I have to pay the water bill.

Q. What is that worth, roughly?

A. I suppose about $8,000.

Q. Does anyone owe you any money; does your son owe you any money? A. Yes, sir.

Q. How much? A. $15,000.

Q. Have you any stocks? I think you testified that you had some stock? A. Yes, sir.

Q. What stocks have you?

A. Paauhan and Hawaiian sugar stock.

Q. How many shares of Paauhan and Hawaiian sugar stock have you?

A. 50 of each and 50 of Hutch.

Q. How much do your sugar stocks bring you in?

A. At present they bring in $50 a month.

(Testimony of Mrs. Elizabeth Nevins.)

Mr. ACKERMAN.—Q. What is Hutch sugar stock quoted at?

Mr. LUCAS.—Hutch averages from 27 to 32, and back. I think now they ask about 27 for it. Paauhan is around 30, I am sure of that.

Mr. LUCAS.—Q. You also had an interest in the steamer "Olsen" before the interest was transferred to you recently? A. Yes, sir.

Q. Where did you get your property from originally,—how did it come to you?

A. From my father.

Q. From your father? A. Yes, sir.

Q. What did your father leave upon his death?

A. He had a franchise for the ferry running from Vallejo to Mare Island.

Q. Was that a valuable franchise? A. Yes, sir.

Q. It brought considerable income, did it?

A. Yes, sir.

Q. Who did he leave that to?

A. He left it to my brother and my son and myself.

[72]

Q. In what proportion? A. One-third each.

Q. One-third of that franchise to you, one-third to your brother, and onethird to you son who lives in Vallejo; is that correct? A. Yes, sir.

Q. Then did he leave you some other property?

A. Yes, sir; he left money and a home.

Q. He left a will, did he?

A. He left me some property in San Francisco. He deeded the property.

Q. Did he ever give anything to your daughter?

(Testimony of Mrs. Elizabeth Nevins.)

A. No, sir.

Q. Never did? A. No.

Q. He gave her no part of the franchise?

A. No.

Q. And no other property, either deeded it or by will; is that correct? A. Yes, sir.

Q. But he did give property to your son?

A. Yes, sir.

Further Cross-examination.

Mr. ACKERMAN.—Q. What is the size of the property on Page Street?

A. It is a 25 foot lot.

Q. What is its depth?

A. I don't know; 137 feet, I think.

Q. Do you know what the assessed value of that property is? A. No.

Q. Do you know how much taxes you pay on it?

A. I don't know—$80 a month.

Q. What value do you place on your interest in the "Olsen"?

A. I don't know what the value is; I know what I paid for it.

Q. How much? A. $3,000.

The COURT.—Q. For a one-eighth interest? Was it a one-eighth interest? A. Yes, sir.

Mr. ACKERMAN.—Q. That is correct, one-eighth interest $3,000, is it not?

A. Is that not what I paid?

Q. If you do not know, Mrs. Nevins, just say so. I believe that is all, Mrs. Nevins.

Defendant rests. [73]

[Endorsed]: Filed Nov. 16, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [74]

[Title of Court and Cause and Number.]

Opinion and Order to Enter Judgment for the Defendant.

LLOYD S. ACKERMAN, Esq., Attorney for Plaintiff.

W. F. SULLIVAN, Esq., and H. C. LUCAS, Esq., Attorneys for Defendant.

The defendant is the mother-in-law of the bankrupt, lent him money from time to time as her daughter requested her to, paid no attention to his business affairs, trusted him and her daughter absolutely, and there is nothing in the evidence that would warrant the Court in finding that she had reasonable cause to believe, or even to suspect that her son-in-law was insolvent at the time of the transfer which the plaintiff seeks to set aside.

Judgment will therefore be entered for defendant.

October 4th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 4, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [75]

[Title of the Court and Cause and Number.]

Judgment for Defendant.

This cause having come on regularly for trial on the 30th day of June, A. D. 1916, being a day in the

March term of said Court, before the Court sitting without a jury, a trial by jury having been especially waived by stipulation of the attorneys for the respective parties, Lloyd S. Ackerman, Esq., appearing as attorney for the plaintiff and W. F. Sullivan, Esq., appearing as attorney for the defendant; and the trial having been proceeded with and evidence oral and documentary upon behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys, having been submitted to the Court for decision;

NOW, AFTER DUE CONSIDERATION AND DELIBERATION HAD THEREON, It is by the Court ordered that by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendant go hence without day; further ordered that defendant recover her costs herein expended, taxed at $11.50.

Judgment entered this 4th day of October, A. D. 1916.

W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Judgment and Decree Book 7, at Page 52. [76]

[Title of the Court, Cause and Number.]

Petition for Appeal and Order Allowing Appeal.

J. W. Marshall, trustee of the estate of N. H.

Hickman, bankrupt, plaintiff in the above-entitled action, considering himself aggrieved by the Judgment and Order made and entered herein on the 4th day of October, 1916, in the above-entitled action wherein and whereby it was adjudged and decreed that the plaintiff take nothing by his complaint and that the defendant have Judgment for her costs, does hereby appeal from such Judgment and Order to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herein, and he prays that this appeal may be allowed and that a transcript of the proceedings and papers upon which said Judgment and Order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated San Francisco, California, October 20, 1916.

LLOYD S. ACKERMAN,
Attorney for Plaintiff and Appellant.

The foregoing petition for appeal is granted and the claim of appeal herein is allowed.

Dated October 20, 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 20, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [77]

[Title of the Court, Cause and Number.]

Assignment of Errors on Appeal.

Comes now the above-named plaintiff and appellant, by Lloyd S. Ackerman, his attorney, and files

the following assignment of errors upon which he will rely upon his appeal from the Judgment and Order entered herein on the 4th day of October, 1916:

1. That the District Court of the United States, in and for the Northern District of California, erred in ordering that the plaintiff take nothing by his complaint.

2. That the said Court erred in ordering Judgment for the defendant and awarding defendant costs.

3. That the said Court erred in its finding or decision that the above-named defendant did not have reasonable cause to believe that the transfer or conveyance of the property described in the complaint, to her, by the bankrupt, would result in a preference.

4. That the said Court erred in that it did not adjudge that the transfer of the 73/128 interest in the schooner "William Olsen" by the bankrupt, N. H. Hickman, to the defendant, was an unlawful preference.

5. That the Court erred in that it did not adjudge that the said transfer be annulled and set aside.

6. That the said Court erred in that it did not adjudge that defendant be directed to make, execute and deliver to plaintiff a reconveyance or transfer of said 73/128 interest in said schooner "William Olsen."

7. That said Court erred in that it did not adjudge that the plaintiff have Judgment against the defendant for the value of said interest so unlawfully transferred. [78]

8. That said Court erred in refusing to decree that the defendant be required to account for the rents, issues and profits of said interest in said schooner from the 7th day of December, 1915.

9. That the said Court erred in that its Judgment was contrary to the evidence.

WHEREFORE the said plaintiff prays that the said Judgment and Order be reversed and that the said District Court of the United States, in and for the Northern District of California, may be ordered to enter an Order reversing said Order and Judgment and awarding the relief prayed for in the complaint in this action with costs to the plaintiff.

Dated October 20, 1916.

LLOYD S. ACKERMAN,
Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Oct. 20, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [79]

[Title of the Court and Cause and Number.]

Admission of Service of Citation on Appeal.

The above-named defendant admits due receipt of a copy of Citation on Appeal in the above-entitled action, original of which was filed in the District Court of the United States, in and for the Northern District of California, on the 25th day of October, 1916.

W. F. SULLIVAN, and
H. C. LUCAS,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 31, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [80]

[Title of Court and Cause and Number.]

Stipulation for Diminution of Record.

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendant that the clerk of the above-entitled court in following the praecipe on file may omit the full title of the court and cause, except upon the praecipe, and thereafter refer to same simply as "Title of the Court and Cause."

It is further stipulated that the clerk may omit all verifications and refer to same as "duly verified."

It is further stipulated that the clerk may omit from the transcript the Demurrer and the Order Overruling Demurrer.

Dated October 24th, 1916.

LLOYD S. ACKERMAN,
Attorney for Plaintiff.
W. F. SULLIVAN,
H. C. LUCAS,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 25, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [81]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Tuesday, the 31st day of October, in the year of our Lord, one thousand nine hundred and sixteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

[Title of Cause and Number.]

Order Transmitting Original Exhibits.

Upon stipulation presented therefor, the Court ordered that in making up the transcript on appeal herein, the clerk may omit the exhibits introduced in evidence at the trial, on behalf of plaintiff and defendant, and may transmit to the clerk of the United States Circuit Court of Appeals the original exhibits in lieu of copying the same in said record. [82]

[Title of the Court and Cause and Number.]

Order Extending Time to File Appeal.

Good cause appearing therefor, it is hereby ordered that the plaintiff in the above-entitled action may have fifteen days from date hereof within which to file transcript on appeal.

Dated November 21, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Nov. 22, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [83]

Certificate of Clerk, U. S. District Court to Transcript on Appeal.

I, WALTER B. MALING, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 83 pages, numbered from 1 to 83, inclusive, contain a full, true and correct Transcript of certain records and proceedings in the case of J. W. Marshall, Trustee of the Estate of N. H. Hickman, bankrupt, vs. Elizabeth Nevins, No. 15,986, as the same now remain on file and of record in this office; said Transcript having been prepared pursuant to and in accordance with "Praecipe for Transcript of Record for Use on Appeal" (copy of which is embodied in this transcript), and the instructions of Lloyd S. Ackerman, Esq., Attorney for Plaintiff herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of Forty-five Dollars ($45.00), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal issued herein. (Page 85.)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 29th day of November, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk.
By T. L. Baldwin,
Deputy Clerk. [84]

Citation on Appeal—Original.

United States of America,—ss.

The President of the United States to Elizabeth Nevins, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, wherein J. W. Marshall, trustee of the estate of N. H. Hickman, bankrupt, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 25th day of October, A. D. 1916.

M. T. DOOLING,
United States District Judge. [85]

[Endorsed]: No. 15,986. United States District Court for the Northern District of California. J. W. Marshall, Trustee, Appellant, vs. Elizabeth Nevins. Citation on Appeal. Filed Oct. 25, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 2892. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Marshall, Trustee of the Estate of N. H. Hickman, Bankrupt, Appellant, vs. Elizabeth Nevins, Appellee. Transcript of the Record. Upon Appeal from the Southern Division of the District Court of the United States for the Northern District of California, First Division.

Filed December 5, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2892

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. MARSHALL, trustee in the matter of the estate of N. H. Hickman, bankrupt,
Appellant,

vs.

ELIZABETH NEVINS,
Appellee.

BRIEF FOR APPELLANT.

LLOYD S. ACKERMAN,
Attorney for Appellant.

Filed this.....day of February, 1917.

FRANK D. MONCKTON, Clerk.

PERNAU PUBLISHING COMPANY

No. 2892

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. MARSHALL, trustee in the matter of the estate of N. H. Hickman, bankrupt,
Appellant,

vs.

ELIZABETH NEVINS,
Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

The appellant prior to this appeal was the plaintiff in an action to set aside a preference, and brought the action in his capacity as trustee of the estate of N. H. Hickman, bankrupt. The facts are that:

On January 14, 1916, an involuntary petition in bankruptcy was filed by certain creditors praying that N. H. Hickman be adjudicated bankrupt.

On January 26, 1916, Hickman filed an answer to said petition admitting the commission of an act

of bankruptcy under Section 382 of the Bankruptcy Act.

On February 2, 1916, N. H. Hickman was adjudicated a bankrupt.

On February 23, 1916, appellant was appointed by the Referee in Bankruptcy, trustee of the estate of N. H. Hickman, bankrupt, and at the time of the institution of the suit was the duly qualified and acting trustee.

On December 7, 1915, and for a long time prior thereto, Hickman was the owner of a 37/64 interest in the schooner "William Olson", and on said date, and for more than one year prior thereto, Hickman was insolvent. On December 7, 1915, Hickman transferred to the appellee a 73/128 interest in the schooner "William Olson", and said transfer was recorded in the Custom House of the United States, at San Francisco. Hickman in his answer filed in the bankruptcy proceedings admitted under oath the transfer of this property to the appellee while he was insolvent and with intent to prefer her over his unsecured creditors. At the time of the aforesaid transfer Hickman claimed to have been indebted to Mrs. Nevins, the appellee, in the sum of $8600, upon an indebtedness which was incurred prior to 1912. The appellee and transferee of the above described property was the mother-in-law of Hickman. Hickman in his bankruptcy schedule admitted debts in the sum of $36,934.40 and assets of

$50.00. The value of the schooner "William Olson" was the sum of $25,000, and at the time the transfer was made to the appellee was in active use and under charter and was earning large sums of money. The complaint charged that Hickman intended to prefer the defendant or appellee over his other unsecured creditors, and that at the time the transfer was made the appellee had reasonable cause to believe that the transfer would effect a preference, and also that Hickman had a present intent to prefer her over his unsecured creditors.

The sole issue in the case was whether or not the appellee had reasonable cause to believe that Hickman was insolvent on the 7th day of December, 1915, at the time he transferred to the appellee the interest in the schooner "William Olson", or that the appellee knew that Hickman intended to give her a preference over other creditors. All the other facts were admitted.

The evidence disclosed the following facts:

N. H. Hickman resided in San Francisco since 1890 and was married on October 5, 1897, to the daughter of the defendant or appellee. The appellee had her residence in Vallejo and since the date of her daughter's marriage resided alternately with her son in Vallejo, and her daughter in San Francisco, Mrs. N. H. Hickman. Since the date of Hickman's marriage he had been in many business activities, the lumber business, shipping business, amusement

concession business, drayage business, warehouse business, etc. He was president of the Bay Shore Drayage business, and his wife was the chief stockholder. He became president and manager of this company on the 21st day of May, 1909. This company continued in business until it became bankrupt in 1915. It never was a profitable business. In the fall of 1910 Hickman started a warehouse business, which was unprofitable, and which was closed in October, 1913. He was also interested in the Pacific Aeroscope Company, which never paid a dollar. From May, 1909, until 1912 Hickman had made some money out of the lumber business. Hickman admitted he had been insolvent since 1906. He resided for several years in a home on Page Street, which was owned by his wife. He claimed that he had never during the past few years had any conversation with his mother-in-law, the appellee herein, in regard to business matters, never spoke to her about them, and never discussed finances with her. She never asked him how he was getting along, but he had had financial transactions with her through Mrs. Hickman, his wife. On December 7, 1915, he was indebted to appellee in the sum of $8600 for money loaned. This money was borrowed over a period commencing in 1905. On the 15th day of February, 1912, he gave her a note to cover the indebtedness due her from February 15, 1908. Subsequent to 1912 he borrowed additional money from her. The appellee loaned Hickman money in the following amounts and on the following dates:

February	15, 1908	$1250.00
"	21, 1908	1250.00
October	17, 1908	500.00
"	24, 1908	2500.00
November	14, 1908	409.60
April	10, 1909	34.40
July	21, 1910	125.00
October	31, 1910	70.00
February	15, 1912, Interest	968.96
August	26, 1912	2500.00

Mrs. Nevins, the appellee, gave him money to pay his taxes, $34.40. He never paid her any interest at any time but the item of February 15, 1912, $968.96, is the amount of interest computed at the rate of 5% on the total amount of the indebtedness. Hickman gave the appellee credit for this sum. The Bay Shore Drayage Company, of which Mr. Hickman was the president, and Mrs. Hickman was the chief stockholder, was indebted to the appellee also in the sum of $2725. Hickman claims that he never asked the appellee for money in his life, and whenever he wanted money from her he spoke to his wife and she asked her mother. He paid Mrs. Nevins, the appellee, interest on the amount which he owed her from 1905 to 1909; paid no interest subsequent to that date. In 1914 Hickman was sued by the Albion Lumber Company for $1200. They obtained a judgment in 1914, which was never paid. Another judgment was obtained in June, 1914 or 1915, and was never paid.

Appellant then produced testimony, which is undisputed, that Hickman's general reputation in the community in which he lived for five years previous to the date of trial was that he was insolvent. Plaintiff introduced in evidence (plaintiff's exhibit No. 2) an agreement whereby the appellee agreed to defer collection of her claim against the Bay Shore Drayage Company in consideration of the advance of certain other moneys by O. H. Greenewald. O. H. Greenewald testified that he explained Hickman's financial condition to his wife and asked her to discuss the matter with her mother, and that Mrs. Hickman agreed to do so. Thereafter, Hickman reported to Greenewald that his wife had gone to see her mother concerning the matter. This took place in November, 1915. Greenewald had asked Hickman to transfer to him as security for Hickman's indebtedness to him his interest in the "William Olson". The following month Hickman transferred this interest to the appellee.

The appellee, Mrs. Elizabeth Nevins, then took the stand in her own behalf and testified that Hickman never spoke to her of business; that she loaned him money at her daughter's request; that she knew nothing at all about his business; that she is a woman of some means, attends to her own business affairs, has enjoyed an income of as much as four or five hundred dollars per month. That she never knew anything about Hickman's financial difficulty until she saw it in the paper the latter part of December, 1915; that she always had perfect confi-

dence in Hickman; that she never suspected that he was insolvent.

On cross-examination her testimony was so contradictory that it is almost impossible to put it in narrative form. She testified that she was worth about $15,000; that she never asked Hickman any questions about his business affairs, nor did she ever display any interest in them. When Mrs. Hickman wanted to borrow any money for her husband she would tell the appellee that Hickman needed equipment in his business, and asked for the money, and the appellee gave it to her. She never made inquiries as to what the money was required for, nor did her daughter tell her; she did not know what Hickman was doing. She loaned money to the Bay Shore Drayage Company, which she supposed was for Hickman's use. At the time she signed the contract referred to as plaintiff's exhibit No. 2, her daughter told her that Mr. Greenewald was going to assist her husband and that she, the daughter, wanted her, the appellee, to sign so that Greenewald could get his money first. She did not think she read the agreement before she signed it; she does not know what the agreement provides for. The agreement did not create suspicion in her mind as to Hickman's finances; she never thought anything about it. She knew that Hickman's business was the Bay Shore Drayage Company; she kept no books; she was in the habit of giving her daughter money to buy clothes with, or for anything she needed. She knew that Hickman needed money for his

business, and there was no one else to give it to him. Hickman repaid her the money that he borrowed many times prior to 1912. She did not remember whether he paid her back after 1912.

Hickman never spoke to her about the money he owed her or of the interest. The first she knew about the transfer of the interest in the "William Olson" made by Hickman to her in December, 1915, was when he told her that he transferred the stock to her. She never requested him to do it. She never discussed Hickman's business affairs with her son. She knew in the spring of 1915 that Hickman had placed a mortgage on the "William Olson"; she became managing owner of the "William Olson" after the transfer of the Hickman interest to her, and appointed Hickman as her agent.

Errors Relied Upon by Appellant.

Inasmuch as the opinion by the lower court held only that the defendant did not have reasonable cause to believe that a preference was intended and therefore ordered judgment for defendant, the assignments of errors, of which there are nine, are founded upon failure of the court to give the relief prayed for in the complaint and action of the court in awarding judgment for defendant. We therefore rely upon all the assignments of error set out on pages 99-101 of the transcript. Assignment of error No. 3 is typical. It reads:

"3. That the said court erred in its finding or decision that the above named defendant did not have reasonable cause to believe that the transfer or conveyance of the property described in the complaint to her by the bankrupt would result in a preference."

The Law of the Case.

The burden of proof in cases where a preference has been given to a near relative shifts to the defendant to show by satisfactory proof that the transaction was in good faith and without knowledge of the purpose and intention to give a preference.

In re Sanger, 169 Fed. 722; 22 A. B. R., 145.

In this case the sister-in-law of the bankrupt loaned him the sum of four hundred and fifty and no/100 (450) dollars. The bankrupt testified that the understanding was that security would be given. Therefore the complainant contended that the burden was upon the objecting creditors to show:

1st. That the bankrupt was insolvent at the time security was given.

2nd. That it secured to the complainant a greater percentage of her debts than was secured to any other creditor of the same class; and

3rd. That complainant had reasonable cause to believe that a preference was intended.

The court said:

"These three propositions so asserted, under ordinary circumstances, are sound and are up-

held by a multitude of authorities, but it seems to me a clear distinction is to be drawn as to the burden of proof in such cases between strangers asserting such claims and the assertion thereof by near relatives. In this case a sister-in-law on several different occasions loaned sums of money, without, it would seem, taking any note or obligation therefor at the time, and without being able even to recall the dates of such loans; but less than one month before a voluntary petition in bankruptcy is actually filed by the brother-in-law secures from him and his partner a negotiable note, which in no way discloses her connection with the debt, and the same is secured by a deed of trust in general terms to any holder thereof. It seems to me that such facts in themselves constitute prima facie evidence of knowledge both of the insolvency and the intention of the bankrupts to give her a preference over other creditors, and that, so establishing a prima facie case of knowledge, the burden is upon her, by satisfactory proof, to show that the transaction was in good faith and without knowledge of such purpose and intention."

The fact that the person to whom the preference is given is a woman wholly unacquainted with business knowledge is immaterial. The appellee in this case was required to exercise the discretion and prudence of an "ordinarily intelligent man", and if facts are shown which would have put a prudent business man on notice of Hickman's insolvency the appellee cannot plead failure to appreciate the significance of these facts. Her conduct is to be judged by the standard of what an ordinarily

intelligent business man would have done under the circumstances.

Wright v. Sampter, 150 Fed. 196; 18 A. B. R. 355.

The defendants were relatives of the bankrupt, and had money on deposit with him. They were women and unfamiliar with business matters. They had had money on deposit with the bankrupt for some time. The accounts were of long standing. Ten days prior to the petition in bankruptcy, the bankrupt paid these accounts in full.

> "It has frequently been said in actions turning upon the presence or absence of reasonable cause to believe a material or vital fact, that anything 'sufficient to excite attention and put a party on inquiry is notice of everything to which inquiry would have lead', and that known facts 'calculated to awaken suspicion' will justify an inference of actual and complete knowledge."
>
> *In re Knopf,* 16 Am. B. R. 432;
>
> *Parker v. Conner,* 118 N. Y. 24.

> "But obviously facts, whether producing certainty or merely suspicion, must have a mind upon which to operate and affect, and the rule is equally well established that it is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of an 'ordinarily intelligent man' (Grant v. Bank, 97 U. S. 80); 'a prudent business man' (Bank v. Cook, 95 U. S. 343; Toof v. Martin, 13 Wall. 40) 'a person of ordinary prudence and dis-

cretion' (Wager v. Hall, 16 Wall. 584); 'an ordinarily prudent man' (In re Eggert, 4 Am. B. R. 449); 'a prudent man' (Dutcher v. Wright, 94 U. S. 553).

"The peculiarity of this case is that the mind to be affected is that of a confiding niece, wholly unacquainted with business knowledge, and however intelligent and prudent in matters within her own experience, incapable of comprehending the significance of business facts, which would have been more than enlightening to men of the business world. It is therefore urged by the defendants that Barbour v. Priest, 103 U. S. 293, justifies the proposition that not only must the facts exist and be sufficiently impressive to make inquiry in such minds as are catalogued in the cases above cited, but they must be sufficient to impress their significance upon the mind of the person to be affected—in this case a woman leading a life apart from the world of business. It was indeed said in the case last cited (one inducing great sympathy for the preferred creditor) that it is 'necessary to prove the existence of this reasonable cause of belief * * * in the mind *of the preferred party*' (p. 296).

"But these words must be taken in conjunction with the whole opinion, which was written in express consonance with Grant v. Bank, supra, and the phrase quoted I take to assume in 'the preferred party' the mind of 'an ordinarily intelligent man'.

"It would be intolerable that the voidability of a preference should depend not upon the effect of facts admittedly or by proof known to a defendant, but upon the degree of intelligence or experience which such defendant was capable of exercising in respect thereto; such

a rule would put a premium upon ignorance and encourage the assumption thereof."

Grant v. National Bank of Auburn, 37 A. B. R. 329-342;

Matter of Gaylord, 35 A. B. R. 544;

Stern v. Paper, 25 A. B. R. 451;

Patterson v. Baker Grocery Co., 33 A. B. R. 740.

If Hickman's inability or failure to meet his obligations, or any other facts of a suspicious nature shown by the testimony, would have led a prudent business man to make inquiries as to his solvency and the appellee failed to make such inquiries, the transfer was void.

In *Re John J. Coffey,* 19 A. B. R. 148:

"Creditors have reasonable cause to believe that a debtor, who is a trader, is insolvent when such a state of facts is brought to their notice respecting the affairs and pecuniary condition of the debtor, as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business. When they are fairly put upon inquiry, and have neglected to make it, they are justly chargeable with all the knowledge it is reasonable to suppose they would have acquired if they had performed their duty as required by law. And he who deliberately shuts his eyes and ears to means of knowledge, and as to matters which he says 'he is not interested in' has reasonable ground to believe what ordinarily diligent inquiry could ascertain. 'Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances, is notice of all the facts

which a reasonably diligent inquiry would develop.' And such notice is reasonable cause for relief."

In *Re C. J. McDonald and Sons,* 24 A. B. R. 446:

The court holds that if the creditor failed to investigate, he is chargeable with all knowledge which it is reasonable to suppose he would have acquired if he had performed his duty in that regard and when the bankrupt pays his entire estate and one creditor alone is benefited thereby, there is a strong presumption of unlawful preference.

In *Ogden v. Reddish,* 29 A. B. R. 543:

"The defendant company, at the time the mortgage was executed, had at least this much knowledge as to the bankrupt's financial condition. It knew that he was heavily in debt to it on an account long overdue and bearing interest, and that so far at least as it was concerned he was not able to meet his obligations as they became due. It knew what real estate he owned, and that with the execution of its mortgage it all became encumbered nearly at least to the amount of its value. And it also knew the extent of his indebtedness, and that it was a large indebtedness. All this knowledge except that as to ability to meet his obligations, was obtained at the time the mortgage was executed from inquiry and investigation. It may be said to come short of knowledge of the fact that the bankrupt was insolvent and the mortgage covered a greater percentage of his property than it was entitled to. And it may be conceded, for the sake of the argument at least, that this knowledge was not such that the reasonable inference therefrom was that the bankrupt was insolvent and the mortgage covered

such greater percentage; i. e. it was not such that the reasonable effect thereof was a belief that such was the case. It may be taken for granted further that its action in the matter was not such as to show that it did so believe, from which it might be inferred that it had more knowledge than the evidence discloses. *It would seem to be certain, however, that it feared that the bankrupt was insolvent. The evidence which it had was calculated to create such fear, and it acted as if it did so fear. It did so in not inquiring or making any examination as to the bankrupt's assets after it had ascertained the extent of his liabilities.* The failure so to do can reasonably be accounted for on the ground that it feared that he was insolvent and it can be accounted for on no other ground. It must have known that if the bankrupt was insolvent, and it knew him to be so, its mortgage would be invalid. It did not then know he was insolvent. Further inquiry, or an examination of the stock and books, might reveal that he was. By refraining therefrom it would be in a position to claim that it did not know, or had no reasonable cause to believe, that the mortgage would effect a preference. Otherwise, in the natural course of things, it would have so inquired. It was considerably interested in his condition. The knowledge which it had was calculated to awaken suspicion, if not fear, of insolvency, and the means of ascertaining were right at its hand. Notwithstanding it stayed the inquiry. It is reasonable to conclude, therefore, that though it may not have believed, or had reasonable cause to believe, that the bankrupt was insolvent, it feared that he was, and it so feared it that it shut its eyes to the truth in regard to the matter."

Analysis of the Testimony.

Having shown from the authorities that the burden of proof in this case is upon the appellee to show that the transaction was in good faith, and without knowledge on the part of Hickman's intent to prefer her, it will profit us to closely examine the appellee's testimony to determine whether or not this burden was fairly sustained. A careful review of the testimony is justified in cases of this kind as the courts have uniformly declared that no set rule can be laid down as to what constitutes reasonable cause to believe.

> "Each case stands pretty much on its own bottom."
>
> *In re Wolf & Co.,* 21 A. B. R. 83.

To begin with we have shown that in actions of this kind the presence or absence of "reasonable cause to believe" is determined by definite considerations. The following rules are established by the authorities above quoted:

1st. Anything sufficient to excite attention and put a party on inquiry is notice of everything to which inquiry would have led.

2nd. Known facts calculated to awaken suspicion will justify an inference of actual and complete knowledge.

3rd. In cases where the preference is given to a near relative the burden of proof shifts from plaintiff to defendant to show that the transaction was in

good faith and without knowledge of the purpose to prefer.

4th. It is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of "an ordinarily intelligent man", "a prudent business man", a person of ordinary prudence and discretion.

5th. The fact that the party to whom the preference was made is incapable of comprehending the significance of business facts and is wholly unacquainted with business knowledge is no defense.

Now let us inquire what facts are generally assumed to be of a nature to put a prudent business man upon inquiry as to the solvency of a person with whom he has business relations. Of first importance is the ability of the subject to meet his obligations, the promptness with which he pays interest on loans, his general financial reputation in the community in which he lives, his requirements in the line of accommodation, his standing with his bank, the financial standing of the corporation or business with which he is identified, his reputation as a successful business man, the prosperity of the business to which he devotes his time or in which he is financially interested, suits which are prosecuted to judgment against him and whether or not the judgments are paid, and a variety of circumstances and opportunities of observation which are noted and their significance appreciated by the "prudent business man".

We have shown that from Hickman's admission he was insolvent since 1906 (p. 18 trans.); that he commenced borrowing money from his mother-in-law in 1905 (p. 20, trans.); that since 1912 he paid his mother-in-law no interest on the note of $6100 (p. 26 trans.); that in 1914 the Albion Lumber Company obtained judgment against him for $1200, which was never satisfied (p. 29); that his reputation in the community in which he lives was that he has been insolvent for five years (p. 40).

Turning to the testimony of Mrs. Nevins we wish to state our firm belief that from beginning to end her testimony is studiously evasive and downright dishonest. It bears unmistakable evidence of a deliberate, painstaking and well schooled determination to adhere to a fatuous pose of ignorance, inexperience and unworldliness. It is characterized by an apparent simplicity and innocence which defies the imagination. Mrs. Nevins is 64 years old, and the bare fact of having lived that long belies the pose of sublime idiocy which she assumed at the trial.

Let us first take her testimony regarding financial affairs on direct examination:

"Q. Have you considerable means?
A. Well, some.
Q. What is the source of your income?
A. I have rents; I have sugar stock; I have interest money.
Q. During the last eight or ten years what has been your average monthly income, about?
A. It has been as high as 400 or 500 a month; at present it is less; it is not so much.

Q. About what are your average expenses?
A. *I do not have any.*
Q. Practically no expense?
A. No." (All on p. 53 of trans.)

On cross-examination.

Q. Mrs. Nevins how much money have you; what would you say you are worth financially?
A. I could not say.
Q. In order to determine that you would have to appraise the various stocks that you have, is that a fact?
A. Yes, sir.
Q. Tell me approximately how much money are you worth?
A. It is kind of hard for me to do that.
Q. It is very embarrassing for me, but please tell me how much money are you worth?
A. Do you mean for how long—how many years? I do not understand what you want me to say.
The COURT. How much do you regard yourself as being worth in a general way?
A. *Ten or $15,000.*
Q. Ten or $15,000?
A. Yes, sir. (pp. 58-59 trans.)
Q. Is it not a fact that in comparison to the amount of your property a difference or sum of ten or $12,000 is quite a large portion of it?
A. No I have more than that; I think that is what is left remaining to me.
Q. You have about that much left?
A. That is what I think, as near as I can count it." (p. 74 trans.)

On redirect examination, pp. 93-94, the witness answered readily and precisely that her personal fortune was made up as follows:

Money in bank	$ 4,300.00
Real estate, Vallejo	10,000.00
Real estate, San Francisco	8,000.00
Note of her son	15,000.00
Stocks	2,850.00
Interest in "William Olson"	3,000.00
Total	$43,150.00

We ask that the court observe the reluctance with which the witness responded to the questions on cross-examination and how glibly she replied to her own counsel. When the court interposed to ask her how much she was worth, precisely the same question as had just previously been asked by counsel for the appellant, the witness replied to the court "ten or $15,000"; to counsel for appellant she answered, "I could not say", and to her own counsel she figured $43,150.00.

The witness was asked what her average expenses were. She replied, "I do not have any" (supra, and p. 53 trans.).

On page 63 she testified that her average expenses ran from $50 to $120 per month.

The witness testified about advances or loans which she had made to her son, as follows:

> "Q. Have you given your son any money during the past few years?
> A. Yes, sir.
> Q. How much?
> A. Ten or $12,000. I gave him money to help out to buy a piece of property or something of that kind. (p. 57.)
> * * * * * *

Q. Has he ever paid you back?
A. No.
* * * * * *
Q. You do not know how much he (the son) owes you at the present time?
A. No."

It will be perceived that in her set determination to plead absolute ignorance of financial matters she admits that her son borrowed ten or 12,000 dollars, never paid it back—and yet she does not know how much he owes her.

Referring now to the witness' testimony as to her knowledge of Hickman's affairs we find her saying on her direct examination:

"I never knew anything about his affairs until I saw it in the paper.
That was in December.
Q. December, 1915?
A. Yes, sir.
Q. What was it that you saw in the paper?
A. Something about bankruptcy, something about a sale of the Bay Shore Drayage Company.
Q. And Mr. Hickman's name was mentioned?
A. I knew it was him from reading it." (p. 54 trans.)

Compare that to the following:

"Q. What business was Mr. Hickman engaged in during 1915?
A. I do not know what he was doing.
Q. Did he have anything to do so far as you know, with the Bay Shore Drayage Company?
A. I never asked him. I do not know.

Q. Did you ever loan any money to the Bay Shore Drayage Co.?

A. Yes, some money.

Q. Who did you give it to?

A. To my daughter.

Q. For what purpose?

A. I suppose for his use.

Q. Did you know that Mr. Hickman was connected with it?

A. *Yes I suppose that he wanted it to buy horses or buy hay.* (pp. 69-70.)

Q. I am referring to the occasion where you loaned the money, did you make inquiry or were you told what the Bay Shore Drayage Company needed money for?

A. At what time?

Q. I understand it was within the last few years?

A. I suppose to buy equipment.

Q. On what do you base that supposition—were you ever informed what it was needed for?

A. *No. I knew that he was starting out in business and that he needed it.*"

After stating positively that she did not know what business Hickman was engaged in she flatly contradicts herself by admitting that she knew that the Bay Shore Drayage Company was his business.

In 1915 she signed an agreement agreeing to defer the collection of her claim against the Bay Shore Drayage Company in favor of O. H. Greenewald's claim for money to be advanced. Hickman was a party to this agreement (p. 71 trans.).

Now it appears that she knew nothing about Hickman's affairs until December, 1915, when she saw in the paper that the Bay Shore Drayage Company was bankrupt. She knew it was Hickman

from reading the paper (p. 54). She did not know in what business Hickman was engaged in 1915 yet she signed an agreement in which she, Hickman and the Bay Shore Drayage Company were parties. She had loaned money prior to 1915 to the Bay Shore Drayage Company at her daughter's request for Hickman's use. She *did* know that Hickman was connected with the Bay Shore Drayage Company because she supposed that he wanted the money to buy horses or buy hay.

On page 70 she testifies regarding this agreement:

"Q. Who asked you to sign that paper?
A. I don't remember—my daughter.
Q. Did you have any discussion with her about the paper at the time.
A. Yes, sir. She told me Mr. Greenewald was going to assist her husband and she wanted me to sign that so that he could get his money first.
Q. Assist her husband in the Bay Shore Drayage Company?
A. I suppose so, yes. (p. 70.)
Q. Did you ever ask her when she requested a loan of money from you what they needed the money for?
A. She told me.
Q. What did she say?
A. She said that Mr. Greenewald was going to assist them but he wanted to get his money first." (p. 87.)

We pause here to remark that viewing Mrs. Nevins' conduct according to the standard set by the authorities that of a prudent business man, is it conceivable that Mrs. Nevins was not "fairly put upon inquiry" as to Hickman's solvency when

she was told by her daughter that "Greenewald was going to assist her husband" and when she was required to sign an agreement temporarily relinquishing her right to collect her claim against the Bay Shore Drayage Company. She knew that this company was Hickman's. No other conclusion is possible from the testimony quoted.

> "Q. Didn't you say to Mrs. Hickman at any time, 'Is Mr. Hickman getting along all right'?
>
> A. She did not mention anything about his business to me." (p. 72.)

Yet the witness had sufficient knowledge of business to know that Hickman wanted the money to buy horses or hay (p. 70). She even knew that her daughter was a stockholder (p. 89). She knew that he needed money for equipment for the Bay Shore Drayage Company (p. 76). She was a stockholder herself in the Bay Shore Drayage Company (pp. 91-92). She considered the drayage business Hickman's business and spoke of it invariably as his business (p. 87): "I knew that he was starting out in business and that he needed it". Let this be compared to the assertion on page 81, "I did not know anything about his affairs at all—he never talked about his affairs", and on page 77, "We never discussed business at all", and on page 54, "I never knew anything about his affairs until I saw it in the paper", and on page 53, "I knew nothing at all about his business".

We might continue these excursions into the contradictions, inconsistencies and improbabilities of the appellee's testimony until we had copied the entire transcript into the brief. The foregoing, we feel confident, sufficiently demonstrates the truth of the observations that we permitted ourselves at the commencement of the discussion of Mrs. Nevin's testimony. One or two or even three of these striking contradictions might be condoned on the score of nervousness under cross-examination or a failure to duly comprehend the meaning of questions addressed to her, but when these contradictions are carried throughout her testimony, when every assertion of any importance that she made is proven by her subsequent statements to have been untrue her testimony is justly subjected to the gravest misgivings. She was in various ways intimately connected with Hickman's business career. She was a stockholder of the Bay Shore Drayage Company, a part owner of the "William Olson", a party to the agreement between Hickman, Greenewald and the Bay Shore Drayage Company, and the owner of $8600 of Hickman's paper. She endeavored to maintain an attitude of entire ignorance regarding all his affairs totally disregarding all signs which pointed to Hickman's financial distress. Hickman personally was indebted to her in the sum of $8600, the Bay Shore Drayage Company in the sum of $2725, a total of $11,325 without interest or more than one-fourth of her entire fortune.

APPELLEE MUST BE CHARGED WITH ANY KNOWLEDGE OF HER DAUGHTER WHO WAS HER AGENT.

The court must have noted from the foregoing extracts from the testimony that Mrs. Nevins and Hickman testified that they never had any business dealings together whatever. That all of the money which was borrowed from Mrs. Nevins by Hickman was given to Mrs. Hickman. Hickman insists that he never discussed financial affairs with Mrs. Nevins, and Mrs. Nevins likewise stated repeatedly that she never spoke to Hickman about business. All the money which was loaned to Hickman was given to her daughter (pp. 19-27-36-37-52-53-62-70-87 of trans.). Her daughter had access to her safe deposit box (pp. 89-90). We contend that the appellee must not be permitted to hide behind this transparent mask and that if she persistently refused to discuss business with Hickman, although she was loaning him money and conducted all her business transactions with him through her daughter, then, unquestionably, her daughter acted as her agent in these financial matters, and any knowledge which her agent had must be imputed to her. That Mrs. Hickman knew of her husband's financial condition cannot be questioned in the light of the testimony of O. H. Greenewald appearing on pages 44 and 45. This witness stated that he told Mrs. Hickman what conditions existed regarding Hickman's finances; that Hickman was indebted to him in certain sums

which he specified at the time and told her he wanted a settlement. He wanted Mrs. Hickman to thoroughly understand the conditions about Hickman's finances. He told her he had advanced about $10,000 to the Bay Shore Drayage Company and that he had guaranteed a note for Hickman at the bank, and that Hickman owed certain other notes, and that he, Greenewald, "thought he should have a preference". It should not be necessary to cite cases to the point that an agent's knowledge is knowledge of the principal. The case of *In the Matter of Stone,* 37 A. B. R. 138, was one where the knowledge of the son was imputed to the father who was the person as to whom the preference was sought to be set aside. The court said:

> "I am fortified in this view by the total failure on the father's part under the circumstances in this case, to make reasonable inquiries, and because the knowledge of the son is to be imputed to the father." (p. 142.)

To the same effect are

In re Herman, 31 A. B. R. 243, 207 Fed. 594;
Babbitt v. Kelly, 9 A. B. R. 335;
In re Nassoi, 15 A. B. R. 793;
Hewitt v. Boston Strawboard Co., 31 A. B. R. 652; 214 Mass. 260;
Collett v. Bronx National Bank, 30 A. B. R. 599; 205 Fed. 370;
Remington v. Bankruptcy, 1412.

TESTIMONY SHOWING THE KNOWLEDGE AND INTENT OF THE PARTIES TO THE TRANSFER OF THE "WILLIAM OLSON" CONSIDERED WITH REFERENCE TO THE QUESTION WHETHER OR NOT THE APPELLEE KNEW SHE WAS RECEIVING A PREFERENCE.

The evidence shows that Hickman intended to prefer the appellee over his other creditors when he transferred to her his interest in the William Olson in December, 1915 (p. 48). After the transfer to the appellee of the "William Olson" he continued to be its managing owner as agent of the appellee (pp. 49-91).

The appellee was asked on direct examination the following questions:

> "Q. The transfer of Mr. Hickman's interest in the William Olson—that was made to you in consideration for the indebtedness that Hickman owed to you, is that correct?
>
> A. That is what he told me.
>
> Q. For the promissory notes—the two sums of money that he owed you on that date, is that correct.
>
> A. I think so." (p. 55.)

It further appeared that the appellee made no investigation as to what the effect would be of the transfer of this property to her. It was admitted by the pleadings that the "William Olson" was the only asset which Hickman owned at the date the transfer was made.

On page 80 the appellee was asked the following questions:

> "Q. Did you make any inquiries of Mr. Hickman about the William Olson before you purchased it in December, 1915?

A. No, I never spoke anything about it.
Q. You never spoke to him about it at all.
A. The first I knew about it was when he told me he transferred the stock to me.
Q. You did not know anything about it before that time?
A. No.
Q. You never requested him to do it?
A. No."

Where the party to whom a preference is given knows or could upon inquiry have ascertained that the transfer included or comprised all the available property of the bankrupt, the transferee will be presumed to have known that a preference was intended. The law does not permit the transferee to passively accept the preference without realizing or attempting to realize the nature of the transaction.

As was said in *Coder v. McPherson,* 18 A. B. R. 523; 152 Fed. 951:

> "Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose."

In the case of *In re Hines,* 16 A. B. R. 499; 144 Fed. 142, the court said in speaking of a transfer of all of the property of the bankrupt to the defendant:

> "In thus monopolizing the last available asset that the debtor had to deal with he could but know he was getting more than his share if Hines proved insolvent, to which everything pointed. Of this he took the risk and now

that it has gone against him he cannot be heard to say that he did not know that he was getting a preference or that one was contemplated. When that is a necessary result of a transaction it is conclusively presumed to have been intended. And it was sufficiently evident to hold him responsible that that would be the outcome here."

Similarly in the case of *English v. Ross,* 15 A. B. R. 374; 140 Fed. 630, the court said:

"Monopolizing as he thus did all the available assets of the bankrupt the defendant could not but know that he was getting more than his share if Mangan (the bankrupt) proved insolvent, to which everything pointed, and of which he was therefore effected with notice. Of this the defendant took the risk and now that it is proved against him he cannot be heard to say that he did not know that he was getting a preference or that one was contemplated; where that is the necessary result of a transaction it is conclusively presumed to have been intended."

THE CASE OF IN RE HERMAN.

We have now reviewed the evidence sufficiently to demonstrate to the court that the facts of this case bring it within the decision of

In re Joseph L. Herman, 31 A. B. R. 243; 207 Fed. 594.

In this case the trustee filed objection to the allowance of the claim of Mrs. Crocker who was, as in the case at bar, the mother-in-law of the bankrupt. The bankrupt had borrowed from Mrs. Crocker

various sums for which he executed and delivered his promissory notes. With the money so borrowed he engaged in the grocery business. This venture was unprofitable. In the latter part of December, 1910, Mrs. Crocker went to Pasadena and remained there until the last of August, 1912, when she returned to Clarence, Ia., the home of the bankrupt. During her absence she was in frequent correspondence with her daughter, the wife of the bankrupt. About the middle of June, 1912, the bankrupt being in need of more money to continue his business requested his wife, the daughter of Mrs. Crocker, to write to her in Pasadena asking for another loan of $500. The wife wrote to her mother as requested and the mother answered saying she would make the loan but thought she ought to have a mortgage to secure her. A few days later the bankrupt's wife received by mail from her mother $500 in money. The court says that the evidence as to the last loan of $500 is so improbable that it at once challenges one's belief in its truth.

> "Of this it may be said that there is no way that it could be directly disputed, that direct evidence disputing them is not essential and that their testimony could be disproved by the circumstances of the transaction and other circumstances as effectually as by direct testimony."

Mrs. Crocker was 76 years old and was a business woman. The loan was made on July 1, 1912. A mortgage was given to her by the bankrupt on August 12, 1912.

"No part of the mortgage was therefore for a present consideration but was wholly to secure an antecedent indebtedness owing by the bankrupt to his mother-in-law. That it was made pursuant to an agreement to make the same when the loans were made does not relieve it from operating as a preference if the other essentials of a voidable preference required by the act are present. * * * That Mrs. Crocker had reasonable grounds to so believe (that the bankrupt was insolvent) is entirely clear under the testimony, she had loaned the bankrupt the first $1000 to enable him to purchase a small stock of groceries and engage in a grocery business in Clarence. He had no means other than the $1000 so borrowed from her with which to purchase the stock and engage in such business, and this she knew. *In June, 1912, without having paid any part of the principal of this loan, nor does she or the bankrupt testify that the interest had then been paid* upon the $1000 (though Mrs. Crocker credited a year's interest upon the notes in her amended proof) he requested his wife to ask her mother for another loan of $500 to carry him over until fall. The request for this loan and the promise to make the mortgage was made through Mrs. Herman, the bankrupt's wife. The fact that no part of the prior loan had been paid, that it was then 9 months past due, with the request for an additional loan of $500 to carry him over until fall, was sufficient to put her as a reasonably prudent person upon inquiry as to his then financial condition, and she was then chargeable with all the information that such an inquiry would have disclosed. If such inquiry had then been made there can be no doubt that it would have disclosed that the bankrupt was hopelessly insolvent, that he was being pressed by the bank for the payment of its debt; that he was unable to

do so and that the mortgage was intended as a preference to Mrs. Crocker over the bank and other creditors of the bankrupt.

"Again Mrs. Herman acted for her mother in requiring the promise that a mortgage should be given by the bankrupt when the last loan was made (if it was made) and when the mortgage was recorded it was delivered to her to be forwarded to her mother. To hold that she had no reasonable grounds to believe when she so received and forwarded the mortgage that it was intended as a preference to her mother, would be to disregard the testimony and sanction a deliberate violation of the bankruptcy act."

If it be correctly held in the foregoing case that the request of the bankrupt for an additional loan, and the fact that no part of the prior loan had been paid, nor any part of the interest, that it was then nine months past due put the transferee as a reasonably prudent person upon inquiry as to the financial condition of the bankrupt, then the case at bar appears to be far more convincing. Not only had Hickman failed to pay principal and interest for more than seven years but he had approached Mrs. Nevins with the agreement of the Bay Shore Drayage Company whereby she was to defer the collection of her claim against this company so that the company could get financial assistance from another source. As appellee testified on page 70:

"She (the daughter) told me Mr. Greenewald was going to assist her husband and she wanted me to sign so that he could get his money first.

Q. Assist her husband in the Bay Shore Drayage Company?
A. I suppose so, yes."

As has been shown the appellee knew that the Bay Shore Drayage Company was Hickman's business and she knew *that he needed assistance.* We contend that the bare fact that no part of the principal or interest on the indebtedness which was fully due early in February, 1912, was in itself enough to put the appellee on inquiry and that she is chargeable in law with all facts which such inquiry would have disclosed. Hickman admitted he had been insolvent since 1906 (p. 18). It is certain that appellee could easily have ascertained this information as to Hickman's insolvency from Hickman himself had she spoken to him about it but she chose to remain silent and to discuss no business matters with him whatever.

We charge that Mrs. Nevins, "a prudent business man" was put on inquiry as to Hickman's insolvency by the following facts and circumstances:

First. That Hickman owed her a large sum of money prior to 1908 which he paid with interest.

Second. That he continued to borrow from her from 1908 to 1912 various sums none of which he repaid.

Third. That he paid her no interest from 1908 to the date of trial.

Fourth. That he borrowed $2725 from her subsequent to 1912 for the Bay Shore Drayage Co.

Fifth. That no interest was paid on this amount of $2725.

Sixth. That she knew that Hickman needed "assistance" in the Bay Shore Drayage Co. when the Greenewald agreement was signed by her.

Seventh. That she knew that Greenewald was going to "assist" Hickman.

Eighth. That she knew of no means of livelihood that Hickman had other than the Bay Shore Drayage Co., and the William Olson, and that she knew that neither paid any dividends because she herself was interested in both (p. 78).

Ninth. That unpaid judgments were on record against Hickman and that any inquiry as to his finances would have disclosed this fact.

Tenth. That Hickman's general reputation was that of an insolvent.

Eleventh. That during a period of seven years Hickman paid neither principal or interest of his debts to her until December 7, 1915, when he transferred to her all his property, to wit, his interest in the William Olson voluntarily, without solicitation on her part, and that this transfer in itself was sufficient to put her on notice of his insolvency.

There can be to our mind not the slightest doubt that the common dictates of prudence demand that a business man to whom is owing a large sum of money representing one-fourth of the subject's capital who receives for a period of three years no payment of principal or interest is required in law

to investigate the financial condition of his debtor, to make some effort to collect and is charged with notice of a preference when suddenly without solicitation on his part the debtor makes over to him a valuable property and demands the return of his notes.

In any case where it is sought to set aside a transfer or preference given by one member of a family to another it is a difficult thing to prove knowledge on the part of the transferee of facts which would reasonably induce her to believe that the transferrer was insolvent. The trustee in bankruptcy cannot look into the minds of the parties to the transaction to determine exactly the extent of their knowledge and intent. The only proof which need be adduced in a case of this kind is to show the existence of significant facts, circumstances and general repute affecting the reputation of the bankrupt for solvency which were either known to the transferee or which by the exercise of common diligence might have been ascertained. The law gives to the trustee in this case the benefit of the doubt and because of the intimate relation of the parties to the unlawful transfer, it causes the burden of proof to shift to the appellee to show by competent evidence that the transaction was in good faith and without intent to prefer in what manner has this burden been borne by the appellee. By affecting a pose of ignorance, by shutting her eyes to every fact and circumstance which if seen would have put her upon inquiry, by closing every

avenue of investigation with a purposeful indifference and by insistently resorting to her assumed lack of business experience as her reason for failing to appreciate the significance of facts known to her. If this court should place the stamp of its approval upon such conduct and such a transaction by affirming the decision of the District Court the result would be to invite similar transactions in future between other bankrupts and other mothers-in-law. This is a situation of such common occurrence, that of a bankrupt owing a large number of creditors and among them some female member of his family, who is wholly unfamiliar with business practises, that to permit the bankrupt to deliberately transfer all his assets to the relative in payment of a past due indebtedness with a present intent on the part of the bankrupt to prefer her would be affording a cloak for fraud which would be frequently worn by designing and dishonest persons.

We submit that the judgment of the District Court should be reversed and that this court decree that the transfer of the 73/128 interest in the schooner "William Olson" by N. H. Hickman to appellee was an unlawful preference, that said transfer be annulled and set aside, that appellee be directed to make, execute and deliver to appellant a reconveyance or transfer of said 73/128 interest in said schooner "William Olson" and that appellee be directed and required to account to appellant for the rents, issues and profits thereof from the

7th day of December, 1915, and that appellant have judgment for his costs herein incurred.

Dated, San Francisco,
February 26, 1917.

Respectfully submitted,

LLOYD S. ACKERMAN,
Attorney for Appellant.

No. 2892

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. MARSHALL, trustee in the matter of the estate of N. H. Hickman, bankrupt,
Appellant,

vs.

ELIZABETH NEVINS,
Appellee.

BRIEF ON THE PART OF APPELLEE

W. F. SULLIVAN,
H. C. LUCAS,
Attorneys for Appellee.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2892

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. MARSHALL, trustee in the matter of the estate of H. N. Hickman, bankrupt,
Appellant,

vs.

ELIZABETH NEVINS,
Appellee.

BRIEF ON THE PART OF APPELLEE

Statement of the Case.

This is an action brought by the Trustee of the Estate of N. H. Hickman, Bankrupt, to set aside a transfer of personal property (73/128 interest in the American Schooner "William Olson") made for a good, valuable and adequate consideration by the Bankrupt to Appellee herein within four months before his adjudication as a Bankrupt on a Creditor's Petition.

The only issue made by the pleadings in this case and the only issue to which evidence was directed at

the trial is: Did the defendant know or have reasonable cause to believe that, at the time of the transfer of the property to her, such transfer would effect a preference.

As stated by Appellant's counsel at the trial, the burden was on him to prove the affirmative of this issue, and, while he had no direct evidence to offer in its support, he would endeavor to make out his case by *inference*. In this attempt, we submit he has failed utterly.

His chief witness, Mr. Greenwald, by far the largest creditor of Mr. Hickman, stated merely that he had business relations with Mr. Hickman from 1890 or 1891 continuously up to the adjudication in bankruptcy and that he had known for a number of years prior to the adjudication, (forced by him), that Mr. Hickman was insolvent. He also stated that Mr. Hickman had been, by reputation, insolvent for a number of years, but it was very evident at the trial that Mr. Greenwald's opinion in this regard was based wholly on his own belief. He knew that Mr. Hickman had been actively engaged in various business enterprises at all times up to his adjudication and he had himself been largely interested with Mr. Hickman in at least some of these enterprises. In fact, Mr. Greenwald admitted that he had sold to Mr. Hickman, only a year or so before beginning the bankruptcy proceedings, the very property which he now seeks to get back in this proceeding.

Mr. Greenwald had never at any time had any communication in any manner with the Appellee con-

cerning Mr. Hickman's affairs. The agreement signed by the Appellee in the latter part of 1915, and introduced in evidence by Mr. Greenwald simply recites that both Mr. Greenwald and Appellee had advanced money to the Bay Shore Drayage Co., a corporation, in which both Mr. Hickman and Mr. Greenwald were interested, and that Appellee agreed that Mr. Greenwald should be repaid his loan before she should claim repayment. From this, no inference can possibly be drawn that Appellee knew or had reasonable cause to believe or even to suspect that Mr. Hickman was in financial difficulties. One creditor's postponing payment in favor of another is a common, every day business occurrence and is surely no evidence of a debtor's insolvency. If anything, it merely goes to show that Mr. Greenwald was keener in his business dealings than was the Appellee—a thing to be expected of an experienced business man as against an elderly woman with no business experience whatever. Mr. Greenwald, also, by this agreement was seeking a *preference* and got it. No one is complaining of that.

The Appellee, called as a witness in her own behalf, directly and positively stated that she knew nothing of Mr. Hickman's business affairs and never had the slightest reason to suspect his solvency up to the time of his adjudication as a bankrupt. She did not know and had no reasonable or any cause to believe that, at the time of the transfer of the schooner shares to her in payment of money borrowed from her amounting to $10,000, Mr. Hickman was insol-

vent or intended to effect a preference, or that such transfer would effect a preference in her favor. She is a widow of considerable means and has only two children, a daughter, Mrs. N. H. Hickman, and a son, James G. Nevins. She divides her time between her daughter's home in San Francisco and her son's in Vallejo, and is put to very neglible expense in living. In the course of a long cross-examination, she described her mode of living and the disposition of her income. She has for many years past loaned money both to her son and her son-in-law which they repaid as they saw fit. She knows nothing of her son's business affairs or of her son-in-law's. They do not discuss them with her. The fact that neither her son nor her son-in-law discusses business matters with her is not at all surprising. Men commonly do not discuss such matters with the feminine portion of their households.

She further testified that in all the years during which she had lived with her son-in-law, there was no change in his mode of living. No evidence of any kind which would lead her to believe that he was in failing circumstances. Now and again she bought a dress for her daughter or a toy for her daughter's son, or some trifle for their home because it pleased her to do so.

The testimony in this case was wholly oral and was all taken in the presence of the trial court. It is set forth in full in the transcript on appeal herein. As this court will read the whole of it we do not propose to do as Appellant has done—cull extracts from it

which we might conceive to be most strongly in our favor.

As is constantly repeated in the numerous reported cases of this kind, each case stands on its own circumstances, and we are content to rest our case on the evidence adduced at the trial. As it is clearly and tersely stated by the trial court, in its opinion in this case,

> "there is nothing in the evidence that would warrant the court in finding that she, (the Appellee) had reasonable cause to believe, or even to suspect that her son-in-law was insolvent at the time of the transfer which plaintiff seeks to set aside."

Authorities.

Subdivision b. Sec. 60 of the Bankruptcy Act (U. S.) 1898, as amended in 1910, reads as follows:

> "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or if the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment and transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he

> may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

See *Collier on Bankruptcy,* (10th Ed.) pp. 820 et seq.

Remington on Bankruptcy, Vol. II, Sec. 1405 et seq.

Out of the vast number of cases which might be cited as supporting our case we cite only a few which, by reason of their facts or the discussion of Subdivision "b" of Section 60 of the Bankruptcy Act, most closely conform to the case at bar.

> The burden of proof of the existence of the reasonable cause of belief that the transaction would effect a preference is upon the trustee. *Soule vs. Ashton First National Bank,* (1914) 26 Idaho 66, 140 Pac. 1098.

In *Grant vs. National Bank,* 97 U. S., page 80, the leading case on the question of transferee's knowledge or belief, Mr. Justice Bradley, in delivering the opinion of the Court, uses the following language:

> "It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the fram-

> ers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose."

This language has been constantly quoted with approval in many cases decided since.

See *Getts vs. Janesville & Co.,* 163 Fed. Rep. 417, page 419.

Sparks vs. Marsh, 177 Fed. Rep. 739, page 743.

> "The fact alone that a creditor knows his debtor to be financially embarrassed and is pressing for payment of his claim is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent and that a transfer of property to him as security is intended as a preference."

Syl. Sharpe vs. Allendar, 170 Fed. Rep. 589, Affirming S. C. 164 Fed. 448.

In Re Goodhile, 130 Fed. 471.

Calhoun Co. Bank vs. Cain, 152 Fed. 983.

Reba vs. Shulman, 183 Fed. 564, Affirming 179 Fed. 574.

> "A more difficult question arises respecting the existence of reasonable cause on the part of Appellant at the date of the instrument to believe that his transaction with the bankrupt would, if carried out, effect a preference. Every question of this kind is necessarily controlled by the facts and circumstances of the particular case. Aside from some principles that have general application, it rarely happens that the facts and circumstances of other cases, even though kindred in character, are helpful in solving the question in hand.
>
> "(4) Thus it is a general rule that mere suspicion on the part of the creditor that his debtor is insolvent or that the effect of a given transaction with him would amount to a preference is not enough (First National Bank vs. Abott, 165 Fed. 852, 859, 91 C. C. A. 538 (C. C. A. 8th Cir.); Stucky vs. Masonic Savings Bank, 108 U. S. 74, 75, 2 Sup. Ct. 219, 27 L. Ed. 640), for, in the absence of substantial evidence in that behalf, his suspicions are fairly consistent with the ordinary desire of the creditor to assure himself of safety respecting the debt."

Carey vs. Donohue, 209 Fed. 328 at p. 331.

> "A creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law."

Syl. Stucky vs. Masonic Bank, 108 U. S. 74.

Soule vs. Ashton First National Bank, 140 Pac. 1098.

"Bankruptcy—303 (1)—Preferences—Burden of Proof—"Reasonable Cause to Believe."

> In view of the definition of insolvency contained in the present Bankruptcy Act, a trustee, suing to recover payments alleged to have been voidable preferences, must show that the defendant had reasonable cause to believe that the bankrupt's property at a fair valuation was less that its indebtedness at the time of the payments, and this would seem to require either actual knowledge of the property and debts on the part of the person receiving the alleged preference, or knowledge by him of circumstances warranting the inference that the debts probably exceeded the property."

Clifford vs. Morrill, 230 Fed. 190.

Comments

All the cases cited by Appellant from the Federal Reporter and from the American Bankruptcy Reports, with one exception, are decisions of the District Courts, that is, of the trial courts, and are decisions on the facts as presented. The one exception, Coder vs. McPherson, 152 Fed. Rep. 951, is a decision of the Circuit Court of Appeals for the Eighth Circuit, reversing the District Court's reversal of the *Referee's decision on the facts.*

We do not dispute the statements of the law made in all these cases, or in the few other cases cited by Appellant, which are mostly old cases decided before the present bankruptcy law was enacted, and have no

reason to believe that the Courts came to other than right decisions on the facts. In the case of Wright vs. Sampter, freely quoted from by Appellant as favorable to him and cited as from 150 Fed., although it is in fact reported in 152 Fed. Rep. 196, the District Court held that the transferee received property from the bankrupt, her uncle, without knowledge or suspicion of his bankruptcy and dismissed plaintiff's bill. The last sentence in the Court's opinion is as follows:

> "There is nothing in this cause, except the bare fact that Miss Sampter did not demand or expect payment, to indicate participation on her part in the fraud of her uncle, and that bare fact, even plus the relationship, is not enough to turn the scale against her; it is evidence, nothing more, and on the whole evidence she must be absolved."

On page 26 of his brief Appellant, for the first time, makes the statement that Mrs. N. H. Hickman, the daughter of the appellee, was her agent and that Appellee is therefore chargeable with any knowledge Mrs. Hickman may have had of her husband's affairs.

This is transparently a desperate attempt to support a lost cause. There is absolutely no evidence in the case that Mrs. Hickman was her mother's or her husband's agent and the fact is not so. If it were so, Appellant could easily have proven it by simply asking Mrs. Nevins the question or by calling Mrs. Hickman as a witness. She was present in the Courtroom during the whole trial under subpoena from Appel-

lant but he did not choose to call her. At most, as the slight indirect evidence concerning Mrs. Hickman shows, she acted simply as the husband's messenger or "errand boy" in the matter and in no sense as Mrs. Nevin's agent.

In conclusion, we repeat that this case is wholly one of fact; that the trial court had all the evidence before it and heard all the witnesses and that its decision on the facts was correct and should not be disturbed.

Respectfully submitted,

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Dated, San Francisco, Cal.,
March 12, 1917.